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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, Et Al.

Appeal From the District Court of the United States for the Western District of Pennsylvania.

APPENDIX TO BRIEF FOR APPELLEES.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Pittsburgh, Pa.,
Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Chicago, Ill.,
Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

Of Counsel,
WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.

SMITH BROS. CO., INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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As an aid to the Court we have compiled and file herewith an appendix to the Brief for Appellees containing four divisions as follows:

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1.	Views of Judges Foster, Borah and Kennerly, who composed a statutory court in the Fifth Circuit, which set aside the orders of the Interstate Commerce Commission in nine cases arising out of the same Report of the Commission as is here involved	3
2.	The views of Messrs. Alfred G. Hagerty and Riley A. Gwinn, who appeared as Counsel for the Interstate Commerce Commission (Orig. Tr. Vol. I, page 1) in the present investigation (Ex Parte 104, Part II, Terminal Services) as set forth in Report filed with the Commission..	16

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3. The views of the Interstate Commerce Commission after a thorough investigation of the subject in 1915, as reported in *Car Spotting Charges*, 34 I. C. C. 609 59
4. The views of the Public Service Commission of the Commonwealth of Pennsylvania on the subject of spotting, as set forth in opinion filed February 18, 1919, in the cases of *National Tube Co. et al. v. The Baltimore and Ohio Railroad Co. et al.* 71

Certainly the views so expressed by the foregoing authorities are entitled to great weight in the determination of the issues here involved.

Respectfully submitted,

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.,
Of Counsel.

EXHIBIT 1.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF LOUISIANA

PAN AMERICAN PETROLEUM CORPORATION, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 314 (New Orleans) (Division)
COLIN C. BELL and WM. TRACY ALDEN, Trustees of the Estate of THE CELOTEX COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 315 (New Orleans) (Division)
GREAT SOUTHERN LUMBER COMPANY, BOGALUSA PAPER COMPANY, Incorporated, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 317 (New Orleans) (Division)
STANDARD OIL COMPANY OF LOUISIANA, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 331 (Baton Rouge) (Division)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HUMBLE OIL & REFINING COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 690 (Houston) (Division)
MAGNOLIA PETROLEUM COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 691 (Houston) (Division)
THE TEXAS COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 692 (Houston) (Division)
GULF REFINING COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 693 (Houston) (Division)
THE TEXAS COMPANY vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 718 (Houston) (Division)

BEFORE FOSTER, CIRCUIT JUDGE, AND BORAH AND KENNERLY, DISTRICT JUDGES.

OPINION.

February 24, 1937.

Luther M. Walter, Nuel D. Belnap, John S. Burchmore, Walter, Burchmore & Belnap, of Chicago, Illinois, for Plaintiffs.
Elmer B. Collins, Special Assistant to the Attorney General, Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Nelson Thomas, Attorney, Interstate Commerce Commission, for Defendants.

February 24, 1937.

KENNERLY, District Judge:

These are suits in Equity in the District Court of the United States for the Eastern District of Louisiana (New Orleans and Baton Rouge Divisions) and for the Southern District of Texas (Houston Division) under the Act of Congress of October 22, 1913 (38 Stat. 219, Sections 41, 45, 46 and 47 of Title 28, U. S. C. A.) by the Plaintiffs (hereinafter named) against the Defendants (hereinafter named), to enjoin, restrain and set aside Orders of the Interstate Commerce Commission requiring that the Railroad Companies named as Defendants cease, desist from, and discontinue the payment to Plaintiffs of allowances for performing certain terminal services hereinafter more fully set out and generally referred to as "spotting."

The Original Report of the Commission, on which Orders complained of are based, is reported as:

Propriety of Operating Practices, Terminal Services, 209 I. C. C. 11.

Supplemental Reports, on which Orders complained of are also based, will be found in the printed Reports of the Commission, as follows:

[1]Mexican Petroleum Corporation of La. Inc. Terminal Allowance, 209 I. C. C. 394.

Celotex Company Terminal Allowance, 209 I. C. C. 764.

Great Southern Lumber Company—Bogalusa Paper Company Terminal Allowance, 209 I. C. C. 793.

Standard Oil Company of Louisiana Terminal Allowance, 209 I. C. C. 68.

Humble Oil & Refining Co. Terminal Allowance, 209 I. C. C. 727.

Magnolia Petroleum Company Terminal Allowance, 209 I. C. C. 93.

Texas Company Terminal Allowance at Houston, Tex., 209 I. C. C. 767.

Gulf Refining Company Terminal Allowance, 209 I. C. C. 756.

Texas Company Terminal Allowance at Port Arthur, Texas, 44th Supplemental Report.

There were applications for Interlocutory Injunctions which were heard by a Three-Judge-Court organized under Section 47, Title 28, U. S. C. A., and granted, and the cases have now been heard together, on one Record, on the merits by the same Court, and may be disposed of in one opinion.

(a) No. 314 is a suit by the Pan American Petroleum Corporation, Plaintiff, against the United States of America, The Yazoo & Mississippi Valley Railroad Company (for brevity called Y. & M. V. Ry. Co.), and the Illinois Central Railroad Company, with the Interstate Commerce Commission intervening. Plaintiff is the successor of the Mex-

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[1] Pan American Petroleum Corporation, petitioner in No. 314, In Equity, is successor to the Mexican Petroleum Corporation of Louisiana, Incorporated, in ownership and operation of Destrehan refinery.

ican Petroleum Corporation of Louisiana, Incorporated (for brevity called Mexican Corporation), and owns and operates as did Mexican Corporation, at Destrehan, Louisiana, on the line of the Y. & M. V. Ry. Co. a large oil refinery plant. The plant is situated south of and adjacent to the tracks of the Y. & M. V. Ry. Co. There are within the plant enclosure, tracks which connect with the tracks of Ry. Co., and are used for the transportation of cars moving in interstate commerce between the places where they are loaded and unloaded within the enclosure of the plant and the Ry. Co.'s tracks, the service of such transportation being performed, formerly by Mexican Corporation and now by Plaintiff under a tariff promulgated by the Ry. Co., reading as follows:

> "Terminal Allowances to the Mexican Petroleum Corporation of Louisiana at Destrehan, La.
>
> On traffic to and from points on or reached via The Yazoo and Mississippi Valley Railroad Company or connections.
>
> On all carload shipments (including trap cars containing 10,000 pounds or more of less-carload freight) destined to or coming from the plant of the Mexican Petroleum Corporation of Louisiana at Destrehan, La., the terminal switching service is performed by the Mexican Petroleum Corporation of Louisiana for account of The Yazoo and Mississippi Valley Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this Company and the point at which such cars are unloaded, or

the point at which such cars are loaded in said plant.

For such terminal service performed for The Yazoo and Mississippi Valley Railroad Company by the Mexican Petroleum Corporation of Louisiana, at Destrehan, La., the Mexican Petroleum Corporation of Louisiana will be allowed 90 cents per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in a joint study of the operations of the plant facility made during period June 4, 1929, to June 8, 1929, inclusive, also June 10, 1929, and filed with the Interstate Commerce Commission."

The cease and desist Order of the Commission of which Plaintiff complains as requiring Defendant Railroads to cease and desist making such allowance, under such Tariff, is dated June 25, 1935, and is as follows:

"Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Yazoo and Mississippi Valley Railroad Company to the Mexican Petroleum Corporation of Louisiana, Incorporated, for performance by the latter of spotting service within its plant at Destrehan, La., and the Commission having under date of May 14, 1934, made and filed a report Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental re-

port containing its findings of fact and conclusions with respect to the allowance paid to the Mexican Petroleum Corporation of Louisiana, Incorporated, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Yazoo and Mississippi Valley Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It Is Ordered, That The Yazoo and Mississippi Valley Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, Division 6."

(b) No. 315 is a suit by Colin C. Bell and Wm. Tracy Alden, Trustees of the Celotex Company, Plaintiffs[2] (for brevity called Celotex Corporation), against the United States of America, Texas & New Orleans Railroad Company (for brevity called T. & N. O.), the Texas & Pacific Railway Company (for brevity called T. & P.), the Missouri Pacific Railroad Company (L. W. Baldwin and Guy A. Thompson, Trustees) (for brevity called M. P.), and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans (for brevity called Terminal Co.), with the Interstate Commerce Commission intervening.

Celotex Corporation (as did its predecessors) owns and operates a plant for the manufacture of celotex board, manufactured principally from bagasse, the dried refuse of sugar cane. The plant

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2 Since the institution of the suit, the Trustees have been succeeded by the Celotex Corporation of Delaware.

is located at Marrero, Louisiana. The plant is served by the three Defendant Railroads (T. & N. O., T. & P., and M. P.), the terminal Company performing the switching for the T. & P. and the M. P.

The plant is in two sections which are separated by the tracks of the T. & N. O. and the Terminal Company. As in case No. 314, there are tracks used for the transportation of cars moving in interstate commerce between the tracks of the T. & N. O. and the tracks of the Terminal Company, upon the one hand, the place or places within the plant enclosure, where cars are loaded and unloaded, the service of such transportation being performed by Celotex Corporation (and by its predecessors), for which, first under agreements openly made, and later under tariffs, duly promulgated, an allowance was made Celotex Corporation.

The Order of the Commission of which Plaintiff complains seems to require the Defendant Railroads to cease and desist making such allowance.

(c) No. 317 is a suit by the Great Southern Lumber Company (for convenience called Lumber Company) and Bogalusa Paper Company, Incorporated (for convenience called Paper Company), Plaintiffs, against the United States of America, Gulf, Mobile and Northern Railroad Company, with the Interstate Commerce Commission intervening.

Lumber Company is engaged in the lumber and logging business, and the Paper Company in the paper manufacturing business. They together occupy a large industrial area near Bogalusa, Louisiana. Adjacent to them, but in no manner connected with them, are three other industrial plants, which are referred to for convenience as adjacent plants. As in case No. 314, there are tracks used for the

transportation of cars moving in interstate commerce between the tracks of Railroad Company and the point or points where cars are loaded or unloaded by Lumber Company and Paper Company and adjacent plants. Lumber Company performs this service of transportation not under a regular tariff such as was promulgated in No. 314, but in the form of monthly lump sum reimbursements by the Railroad Company, for wages and costs of materials and supplies used in connection with such work. The Order of the Commission complained of seeks to require the Railroad to cease and desist making such lump sum monthly payments.

(d) No. 331 is a suit by the Standard Oil Company of Louisiana, Plaintiff, against the United States of America, Illinois Central Railroad Company, Yazoo & Mississippi Valley Railroad Company, Louisiana & Arkansas Railway Company, and the New Orleans, Texas & Mexico Railway Company (Baldwin and Thompson, Trustees), with the Interstate Commerce Commission intervening.

Plaintiff owns, maintains and operates an oil refinery (one of the largest in the world) at North Baton Rouge, Louisiana. As in Case No. 314, there are tracks connecting those belonging to or used by the Railroad Defendants with the place or places where cars are unloaded in the plant, and over which tracks cars moving in interstate commerce are transported by Plaintiff under a tariff which makes Plaintiff an allowance for such service. The Order of the Commission complained of seeks to require the Defendant Railroads to cease and desist making such allowance.

(e) No. 690 is a suit by the Humble Oil & Refining Company, Plaintiff, against the United States

of America, the Texas & New Orleans Railroad Company, Missouri Pacific Railroad Company (Baldwin and Thompson, Trustees), the Beaumont, Sour Lake and Western Railway Company (Baldwin and Thompson, Trustees), Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates a large oil refinery at Baytown, Texas, which is served by the Railroad Defendants. Tracks connect numerous locations for loading and unloading cars within the Refinery property with the tracks of the Railroad Companies, over which tracks cars moving in interstate commerce are transported by Plaintiff, and for which Plaintiff is made an allowance under tariffs of the Railroads. The Order complained of required the Railroads to cease and desist making such allowance.

(f) No. 691 is a suit by the Magnolia Petroleum Company, Plaintiff, against the United States of America, the Kansas City Southern Railway Company, and the Texas & New Orleans Railroad Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates an oil refinery at Chaison, Texas. The Railroad Defendants have tracks adjacent to such refinery, and there are tracks leading thereform to the loading and unloading points within the refinery property, over which tracks cars moving in interstate commerce are transported by Plaintiff, and for which Plaintiff is made an allowance under tariffs of the Railroad Companies. The Order complained of requires the Railroads to cease and desist making such allowance.

(g) No. 692 is a suit by the Texas Company, Plaintiff, against the United States of America, the Texas & New Orleans Railroad Company, the Missouri Pacific Railroad Company (Baldwin and Thompson, Trustees), the International-Great Northern Railroad Company (Baldwin & Thompson, Trustees), the Beaumont, Sour Lake and Western Railway Company (Baldwin and Thompson, Trustees), the St. Louis, Brownsville & Mexico Railway Company (Baldwin and Thompson, Trustees), the Atchison, Topeka & Santa Fe Railway Company, the Gulf, Colorado & Santa Fe Railway Company, the Missouri-Kansas-Texas Railroad Company of Texas, and the Burlington-Rock Island Railroad Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns a plant at Houston, Texas, referred to as the Galena-Signal Plant, served by the Defendant Railroads, but the Port Terminal Railroad at Houston generally performs switching services for the Railroads. Plaintiff, however, transports cars moving in interstate commerce over tracks between those of the Railroads and Terminal Company and the point within the plant where cars are loaded or unloaded, for which Plaintiff is made an allowance under tariffs promulgated by the Railroad Defendants. The Order of the Commission complained of directs the Railroad Defendants to cease and desist making such allowance.

(h) No. 693 is a suit by the Gulf Refining Company, Plaintiff, against the United States of American, the Texas & New Orleans Railroad Company, and the Kansas City Southern Railway Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates a Refinery Plant at Port Arthur, Texas, which is served by the Defendant Railroads. Over tracks leading from the point or points of the loading or unloading of cars, Plaintiff transports cars moving in interstate commerce, receiving therefor an allowance under tariffs of the Railroad Defendants. The Order complained of directs the Railroads to cease and desist making such allowance.

(i) No. 718 is a suit by the Texas Company, Plaintiff, against the United States of America, the Interstate Commerce Commission, the Texas & New Orleans Railroad Company, and the Kansas City Southern Railroad Company.

Plaintiff is engaged in the refining, manufacture and sale of petroleum and its products, and owns and operates three plants, known as the Asphalt Plant at Port Neches, the Island Plant, and the Refinery Plant at Porth Arthur, Texas. All of the Plants are large and extensive in size, and are served by the Defendant Railroads. Over tracks connecting the point or points of loading and unloading with the tracks of the Railroad Companies. Plaintiff transports cars moving in interstate commerce, for which it receives an allowance under tariffs of the Railroad Defendants. The Order complained of directs the Railroads to cease and desist making such allowance.

Except in No. 317, where the allowance is in the form of a monthly lump sum, the Tariff quoted in the statement in No. 314 is typical of the tariffs in the other cases; and the Order of the Commission there quoted is typical of the Order complained of in the other cases.

The Defendant Railroads, in obedience to such Orders of the Commission, undertook to cancel and discon-

tinue the allowances set forth in such Tariffs, and these suits followed.

1. The first question is whether the work in transporting, switching and spotting cars, for which the Plaintiffs herein were paid, or were made an allowance under the Tariffs, is a service which the Railroads involved are required to perform as transportation or a part of transportation.

We think that under the evidence, the question must be affirmatively answered. We think it clear that the Railroads involved are required, under the Law, to perform such service as a part of transportation. Subdivisions 3, 4, 5 and 6, Section 1, Title 49, U. S. C. A.; *C. & O. Ry. Co. v. Westinghouse Co.*, 270 U. S. 265, 70 L. Ed. 576; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 264, 57 L. Ed. 576; *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 217, 58 L. Ed. 924; *Los Angeles Switching Case*, 234 U. S. 310, 58 L. Ed. 1319.

There is no evidence that such Railroads are prohibited by the Plaintiffs from performing such service, nor that there are physical conditions which prevent them from doing so. Indeed, there appears to be no "abnormal conditions" of any kind which would serve to relieve the Railroads involved of the duty. *C. & O. Ry. Co. v. Westinghouse, supra.*

2. Having the duty to perform the service, the Railroads involved properly and lawfully contracted with the respective Plaintiffs to perform it, and properly and lawfully made such Plaintiffs allowances therefor in their Tariffs. *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. Ed. 83; *Mitchell Coal & Coke Co. v. Penna. R. R. Co.*, 230 U. S. 247, 57 L. Ed. 1472; *Atchison, Topeka & Santa Fe Railway Co. v. U. S.*, 232 U. S. 199, 58 L. Ed. 568.

3. While the Commission without doubt has the power (Par. 1, Sec. 15, Title 49, U. S. C. A.) to determine whether such allowances are reasonable or unreasonable in amount, whether they do or do not give the Plaintiffs an unlawful preference, or whether they unlawfully discriminate against others similarly situated, etc. (*Interstate Commerce Com. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431; *Southern Pacific Co. v. Interstate Commerce Com.*, 219 U. S. 433, 55 L. Ed. 283, *Interstate Commerce Com. v. Stickney*, 215 U. S. 98, 54 L. Ed. 112; *Interstate Commerce Com. v. Northern Pacific Ry. Co.*, 216 U. S. 538, 54 L. Ed. 608; *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 79 L. Ed. 587), we think that under the evidence here, the Commission was without power to wholly prohibit such allowances.

4. To support a cease and desist order because the rate or practice is unreasonable, preferential, discriminatory, etc., there must be the necessary jurisdictional findings of fact by the Commission. *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 294 U. S. 499, 79 L. Ed. 1023; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U. S. 193, 79 L. Ed. 1382; *Florida v. United States*, 282 U. S. 194, 75 L. Ed. 291; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283; *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U. S. 74, 75 L. Ed. 221. No sufficient findings appear either in the Orders themselves, or in the Reports which are made a part of the Orders.

It follows that Plaintiffs are entitled to the relief for which they pray.

Let Decree be drawn and presented accordingly, along with suggested Findings of Fact and Conclusions of Law if desired. The Court reserves the right to file

Findings of Fact and Conclusions of Law in either or all the cases upon request of any party.

Feb. 24, 1937:

The Clerk will file this Opinion and notify the attorneys for the respective parties.

(Sgd) T. M. KENNERLY,
Judge.

EXHIBIT 2.

The views of the counsel for the Interstate Commerce Commission in the present investigation (*ex parte* 104, Part II, terminal services) as set forth in the following report filed with the Commission:

January 3, 1933.

SUBJECT: Ex-Parte No. 104, Part II, Terminal Services. The placement of cars on private industrial tracks in accessible positions for loading and unloading.

THE SUBJECTS OF INQUIRY:

This part of the much broader inquiry instituted by the Commission's order of July 6, 1931, gave rise to two questions concerning the terminal switching services performed on private industrial tracks in the placement of cars in accessible positions for loading and unloading. In substance these questions are:

1.—Whether such services in whole or in part are common-carrier services which, by operation of law, the carriers are duty-bound to perform; and

2.—Whether, where the industries perform such services, the compensation allowed them by the carriers is lawful; including the further inquiry as to why compensation is not allowed to all industries that perform such services.

They are addressed to three distinct methods of rendering such services, classified as follows:

Group A: Where the industries perform the services and receive compensation, in the form of "allowances" from the carriers;

Group B: Where the industries perform the services and themselves bear the expense without compensation from the carriers; and

Group C: Where the carriers perform the services at the special convenience of the industries.

The occasion for the inquiry was accumulated information—having its source in routine field investigations, and reflected also in numerous formal and informal complaints—disclosing many inequalities and discriminations, at least *prima facie* unlawful, associated with both the performance of the services and the payment of allowances; and further disclosing that for more than a decade the carriers[1] unsuccessfully had been attempting to eliminate such results, as well as to bring both the services and allowances more nearly within what they conceived to be their common-carrier obligation in such matters, by establishing uniformity and also by eliminating wasteful practices regarded as a constantly growing menace against their revenues.

The marginal note[1], set there merely to show in a general way the circumstances which prompted the investigation, is but a narrow outline of the situation as it existed in the years 1920-1921, and as it existed Novem-

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[1] Their own summary, in September, 1920, as related to terminal allowances paid to industries, describes such allowances as the cause of much litigation before the Commission, and as continuing to be "a source of serious controversy and dissatisfaction on the part of many shippers"; adding, that for some time, they, the carriers, had been anxious to find a plan which would "meet all the requirements of the law and operate satisfactorily to their patrons" (Ex. C-139, R. A.-7616). A special committee representing railroads operating in official classification territory, organized to deal with "spotting service on private or industrial tracks", met in Pittsburgh, Pa., June 29, 1921, and specified

ber 21, 1932, when the taking of testimony in this proceeding was closed. No substantial or effective progress appears to have been made in correcting what the carriers considered, and themselves described, to be unjustifiable inequalities and questionable discriminations. Basic uniformity, although attempted, has not been reached, apparently because of variations in policy and differences of opinion as to what may or may not be lawfully done in rendering such services.

Merited, or unmerited, these observations, made as they were by experienced railroad officials in practical contact with the subject—and predicated upon the deliberations and study between them through committees organized and functioning for that purpose—were sufficient to raise inquiry as to whether the law was being violated in rendering these "spotting services," or in the payment of allowances, and particularly whether

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nine particulars in which it deemed "a remedy" necessary, sending those particulars forward to the Traffic Executive Committee for consideration. (Ex. C-139, R. A.-7616, document 4-1063). These particulars emphasized the differences in bases on which allowances were granted; the granting of allowances to some industries and not to others; the industrial engine-hour cost chargeable to industrial, rather than to common-carrier, services, which the carriers were improperly bearing through the payment of allowances; the accommodation of such services to the "convenience of the plant" without regard to carriers' convenience; the demands for increases in the amounts of allowances then being made; and the saddling upon the carriers of other burdens, arising in connection with such services, which were chargeable against the industries. That committee also pointed out that shortly after the termination of Federal control, the traffic executives of official classification territory—"appreciating the importance of uniformity and the necessity for avoiding possible unjust discrimination"—had appointed a special committee to develop, if possible, a practicable method of applying the principles laid down by the Commission; and that the special committee had recommended the establishment of uniform tariff rules to govern the particulars and extent to which the line-haul rates included spotting services. In terms the suggested tariff—which never was adopted or filed, and for descriptive purposes has been called the "rainbow tariff" read as follows:

the prevailing practices unjustly burden the operating revenues and operating expenses of the railroads against the interests of the public as a whole.

The statutory duty of the commission is to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers, and to make orders which will nullify such practices in "whatever form they take and in whatsoever guise they may appear". *O'Keefe v. United States*, 240 U. S. 294; 36 S. Ct. 313. Also, it must keep informed as to whether the railroads are being operated honestly, efficiently, and economically, within the meaning of section 15 of the Interstate Commerce Act. Of course, the commission is without power to supend administration of the law upon considerations of expedience, convenience, or any other grounds.

NATURE OF SPOTTING SERVICE:

The occasion for pursuing the inquiry, and the duty to do so, thus having been established, attention will now be given to the governing law.

"The transportation road-haul rates on carload freight lawfully applicable to and from private or industrial sidings will include the service of spotting loaded and empty cars for inbound and outbound movements under the following conditions:

(a)—Where spotting service on private or industrial sidings requires only one simple switching movement, which is performed by carrier's power, without interference by the industry;

(b)—Spotting service as described in 'a' when performed for account of industries where plants cover large areas and/or have a system of tracks, shall begin and terminate at a designated and agreed interchange yard or track.

(c)—Any service or spotting by the carrier in excess of the service as provided for above shall be subject to a charge or $.....

(d)—At any industry where the carrier arrangea with the industry to perform the spotting service as described in (a) or (b), for the account of the carrier, an allowance therefor amounting to $....., will be paid.

First, as to the nature of the spotting service, in the aspect of whether or not it is a common-carrier service: In express terms the statute (Sec. 1-(3)), defines "transportation" by railroad to include "all services in connection with the 'receipt' and 'delivery', • • • of property transported"; also it includes "cars," to be supplied by the carriers. Hence, the supplying of the car, the receiving of property in carload quantities for transportation, and delivery of the property after transportation, are all essential incidents of "transportation" as defined by the statute, and include the placement of the cars in positions accessible to the consignors and consignees, respectively, for loading and unloading. By long continued custom and practice—now embedded in the law—such placements are made on the carriers' tracks,

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Failing, because of strong opposition by the shippers, including the National Industrial Traffic League, in their efforts to restrict application of their line-haul rates to the measure of spotting service defined in the suggested rainbow tariff, the carriers continued searching for ways and means to eliminate from allowances all cost factors which are not incurred in the uninterrupted movements between their interchange-track connections with the private industrial tracks, and the locations on such private industrial tracks where the cars are finally spotted for loading and unloading. A formula for determining the amount of allowances to be paid industries for the performance of "spotting" services was finally adopted. (Ex. 106). That formula, revised down to July 18, 1929, embodied rules reading as follows:

> "Rule 6. The allowance to a Plant for terminal service shall be the same amount for each connecting Railroad and shall not exceed the amount it would cost the Railroad to perform the same service with its own locomotives, *at its convenience, without interruption or interference*. The cost of Railroad operation to be in each case determined from available data by the Study Committee". (Italics for emphasis.)
>
> "Rule 8. The service between point of interchange and point of loading or unloading, as the case may be, shall be charged to the Railroad, provided it is a progressive movement to point of placement or delivery, performed *without plant interruption or interference. If plant interruption or interference is encountered, the service after such interruption or interference shall be charged to the plant*. (Italics for emphasis.)

within their own established terminals and on their own rights-of-way; also they are made on private industrial tracks off the carriers' rights-of-way, and on the private property of the industries served by them. Such services are included in the established transportation rates, unless, in express terms, the carriers' tariffs, published in the manner prescribed by section 6 of the statute, provide otherwise. *Interstate Commerce Com. v. Stickney*, 215 U. S. 98, 30 S. Ct. 66; *Car Spotting Charges*, 34 I. C. C. 609.

These principles have been so firmly established by long continued and wide application that the citation of other authorities to sustain them is unnecessary. The inescapable conclusion thus reached is that, in nature the "spotting services" are recognized, *ipso jure*, as common-carrier service, to which the shippers are entitled, and which the carriers are duty-bound to perform; so much so, that the writs of mandamus, or mandatory injunction, will lie to enforce the right and compel the duty. *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612.

Then followed Rule 9, which is a partial list of what shall be considered as plant interruption or interference within the meaning of Rule 8. Among these are "(a) convenience of the Plant, such as service in excess of normal operations; (b) plant operations that interrupt or interfere with movements of switch locomotives; (c) holding of cars for advice from plant as to disposition", etc.

The formula was used solely for the purpose of measuring the allowances, and although it defined the services which the carriers conceived to be covered by their rates, the definition and description there given was wholly ignored where the services were being rendered with their own power. The formula was in no sense mandatory. The effort was to restrict the allowances to iron and steel industries, and to compute them on basis of 1916 costs, but in this there was neither consistency nor measurable success. The spotting services which the carriers define as covered by their line-haul rates, for the purposes of measuring allowances are, as elsewhere more particularly described, substantially less in measure and value than those performed by them with their own power without charge in addition to the line-haul rates

ESTOPPEL BY THOSE OTHERWISE ENTITLED TO SERVICE:

Second, the considerations, if any, which will relieve the carriers from performing this common-carrier duty are now to have attention. In reference to the described common-carrier obligation, there are circumstances which will materially lessen, and sometimes wholly avoid what otherwise would be the duty of the carriers. Categorically, and in effect, as against the consignor or consignee, these are tantamount to estoppel of demands they otherwise could enforce for spotting services, ordinarily capable of performance, but which, by their own acts, are rendered incapable of performance by the carriers. Typical of these circumstances are: (a) where the industry refuses to permit the carriers' locomotives to enter in and upon the private industrial tracks for the purpose of performing that service; (b) where the physical condition of the private industrial tracks—due to lack of adequate maintenance, excessive curvatures, light weight of rail, numerous crossovers, turn outs, switches, or other obstacles—will not reasonably accommodate the carriers' power without hazard or excessive delay; (c) where the industrial plant occupies large areas over which are scattered many separate plant units, connected by systems of industrial tracks, used chiefly or exclusively as industrial facilities for industrial purposes, and over which plant power operates in the daily intramural movements and shiftings essential in distributing materials and products to particular locations for convenient and immediate use in industrial processes.

Where the carriers are prevented from freely performing their common-carrier duties by any of the obstacles described in the preceding paragraph, especially those within the descriptive designation "(c)", more par-

ticularly outlined in the margin[2], they are relieved, at that point where the obstacles are encountered, from going beyond—without compensation in addition to the established transportation rates—for the purposes of placing cars on private industrial tracks in accessible positions for loading or unloading at designated locations; the services beyond those points over the private industrial tracks, to or from the desired locations, under such circumstances, not being common-carrier services included within the established transportation rates.

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2 Typical of this class, and comparable with numerous other industries described of record—in size, number of separate plant units, number of "spotting" locations, length and lay-out of the private industrial tracks, and the volume of traffic—is the plant of the General Electric Company, Schenectady, N. Y., which, as it existed in November, 1916, was described as composed of 180 acres, on which were 140 separate buildings, 12 miles of standard gauge track, 7 miles of narrow gauge track, 18 spotting locations, and where the volume of inbound and outbound traffic consisted of about 200 cars daily. The industry operated 6 standard gauge electric locomotives in moving cars on the described tracks, and 19 motors in shifting materials between the store houses, shops and mills. *New York Cent. & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 277; 114 N. E. 115, 116, decided Nov. 3, 1916. The suit in the case here cited was brought by the Railroad against the Electric Company for the recovery of unpaid freight charges. The Electric Company entered a counterclaim based upon compensation alleged to be due it for switching cars on its plant tracks for the Railroad, under an agreement that such compensation would be paid out of the freight rates. (114 N. E. 115). The validity of the agreement was the question for determination; the Railroad having committed a breach by discontinuing the payment of compensation (allowance out of the freight rates) to the Electric Company after November, 1905. In a more precise definition the Court said (p. 117) "The decisive question must therefore be whether the switching done by the defendant (Electric Co.) within its plant between the storage tracks (interchange tracks) and the platforms of its mills is work that the plaintiff (Railroad) was bound to do as a part of transportation. To put it in another form, the question is, where does transportation begin and end?" In substance, the judgment of the Court was that the service for which the Electric Company was claiming compensation under the agreement, was not a common-carrier service of transportation, but the convenient distribution of wares among the subdivisions of the industry.

The test of whether such preventive obstacles are actually present in a given circumstance, and are of material, continuing effect against the carriers' ability freely to perform, is often difficult to apply, turning, as it does, on special questions of fact concerning the situation that exists at each industry, and the nature of any special and particular services there demanded of the carriers.

In distinguishing between ordinary "spotting" in the delivery on private sidings, and the more special and particular delivery in conveniently distributing the wares of industries among the subdivisions of their plants over systems of private industrial tracks, Justice Cardozo, in the *General Electric case*, decided November 3, 1916, cited in the margin, characterized the test as "vague," and the difference "one of degree," adding, however, that "as so often in the law, such differences are vital". Earlier, in the *Los Angeles Switching case*, 234 U. S. 294, 310, decided June 8, 1914, particular notice was taken of the distinction by Justice Hughes; and again it was specially observed by the Commission July 6, 1915, in *Car Spotting Charges*, 34 I. C. C. 609, 618, 620. No exact dividing line or point of cleavage was established in any of these cases; nor could there be, because, as pointed out by Justice Cardozo in the *General Electric case, supra*, p. 117:

> "In the nature of things no inflexible formula can furnish a solution of that problem. The limits of place within which delivery is due will vary with varying conditions"; citing *Mitchell Coal & Coke Co. v. Penna. R. Co.*, 230 U. S. 247.

This fact is borne out by the testimony in the present proceeding, showing a variety of different circumstances and conditions under which the "spotting" services are either performed or paid for by the carriers; from which the conclusion must be reached that the question is one for local consideration in reference to

each separate industry, and not open to control by omnibus inflexible rule.

But the cited cases—and others on the subject to which reference will be made in appropriate place—are significant in another aspect: None of them go so far as to hold, as a matter of judicial determination, that the placement of cars on private tracks in accessible positions for loading and unloading—even where in some measure the described obstacles are present, and where the performance and its incidents accomplishes the "convenient distribution of wares among the subdivisions of an industry"—is a service which the shipping public may not demand of the carriers in return for reasonable compensation in addition to the established transportation charges; or a service that the carriers may refuse to perform for reasonable compensation in addition to the transportation rates. Observing this side of the question, Justice Cardozo pertinently remarked:

> "We are asked * * * whether it can be 'the policy of the nation to prevent the most economical production of manufactured goods or to compel the defendant (General Electric Co.) to cart its vast shipments from cars placed upon the plaintiff's (Railroad's) own side tracks remote from defendant's works'. The assumed alternative is an unreal one. The question is not whether switching within the plant shall cease. The question is, who shall pay for it? To compel the plaintiff (Railroad) to pay by deduction from the regular rates or any service not a part of transportation (covered by those rates) is to prefer defendant (General Electric Co.) over others. *Armour Packing Co. v. U. S.*, 209 U. S. 56, 72; 28 S. Ct. 428. It is not the policy of the nation to place business clogs upon commerce, but it is the policy of the nation that preferences shall be impossible." *General Electric case, supra*, p. 119.

In the *Car Spotting case, supra*, the commission observed, p. 618, that:

> "The mere fact that many individual plants are operated together as a single industry does not deprive the industry of the right to such a service ("spotting") in the receipt and delivery of carload freight at each of the several plants as that plant would be entitled to have if it were operated separately, unless the collective operation so far removed the necessity for such a service as to make it unreasonable for the industry to demand the service."

Also, it observed that:

> "There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and *where a charge for the spotting service in addition to the line-haul rate might therefore be justified,* but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt and delivery of carload freight." (Italics for emphasis.)

Later, the Commission sustained charges in excess of the line-haul rates for special spotting services. *Railroad Commissioners of Florida v. F. E. C. Ry. Co.,* 42 I. C. C. 616, January 3, 1916; and in a number of cases—important among which are *Carey Mfg. Co. v. Director General,* 59 I. C. C. 640; *United States Cast Iron P. & F. Co. v. Director General,* 57 I. C. C. 677; *Jackson Iron & Steel Co. v. Director General,* 77 I. C. C. 110; 91 I. C. C. 201—it found that the described "spotting", performed by the industries, for which allowances were being paid them by the carriers, apparently were services in excess of those which reasonably could be regarded as services within the line-haul rates.

But refusal by the carriers to perform even the described special and particular services, at reasonable compensation in excess of the line-haul rates, upon the ground that such services may not be compelled, has never been upheld, and apparently never has been judicially determined—either affirmatively or negatively—upon direct issue raised, under the circumstances here outlined.

Such services clearly are essential physical incidents in receiving and delivering carload freight, and by their very nature justify the conclusion that where possible of physical performance by the carriers—despite their special and particular character, and despite the elements of interference, delays, and probable excessive operating costs, all arising out of conditions for which the industry is responsible—they nevertheless are services which may be demanded of the carriers for reasonable compensation in excess of the line-haul rates, and therefore are common-carrier services.

Where such services are of the special and particular character here described, not included in the established line-haul rates, they are of a nature that affects the "value of the service rendered to the shipper or consignee," within the meaning of section 6 of the regulating statute; and, whether rendered gratuitously, or at a special charge in addition to the line-haul rates, the tariffs must expressly so provide, in certain and definite terms.

SERVICES WHICH THE CARRIERS
ARE PRIVILEGED TO PERFORM:

Third, the foregoing considerations, it will be observed, relate to the common-carrier duty of spotting cars, which, *ipso jure,* may be compelled; and to the circumstances where that duty may either be modified or wholly avoided—such as the presence of the described

preventive obstacles placed in the way by the industries, which obstruct the carriers' freedom of performance.

The authorities thus far cited, all of them, are instances where the carriers were defending themselves against claims for such services without charge in addition to the established transportation, or line-haul, rates; these being circumstances quite distinct and different from instances where the carriers, without charge in addition to the line-haul rates, voluntarily perform such services, under conditions, where they may not be compelled to do so.

There are many so-called free, and accessorial services; such as transit, reconsignment, concentration, storage, and others, all incidents of conducting transportation, which, in the absence of unlawful discrimination, may not be compelled without charge in excess of the regular transportation rates. So here, in reference to these spotting services, incident to receiving and delivering carload freight, the carriers are privileged—so long as they observe the statutory inhibitions against unlawful discriminations—to render services in excess of those which reasonably may be required of them, without assessing charges in addition to their established transportation rates. They may bring coal, or pay for moving it, over private tracks from the mines to their own tracks, over considerable distances, without charge in addition to their transportation rates. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247. Similarly, they may move lumber, or pay for moving it, from mills, located substantial distances off their rails, over the industrial tracks of the lumber companies, to their own tracks, and include such services in their established lumber rates. *Tap Line Cases*, 234 U. S. 1. They may, and generally do, reach industries off their own tracks by absorbing out of their rates the switching charges of the switching carriers; and such switching charges, like the line-haul

rates, generally include the placement of the cars in accessible positions for loading and unloading on private industrial tracks.

These are matters of long continued custom and practice, embedded as such into the law; and with which the law interferes only where rebating, unjust discrimination, undue prejudice, or undue preference, is shown to exist. Besides, the rendition of these so-called accessorial services, free of any charge in excess of the transportation rates, may properly be regarded—and in most instances probably is regarded—as a sound transportation business policy productive of revenue increases, rather than being burdensome against either railway operating revenues or railway operating expenses. Of this the Supreme Court of the United States took notice in *Interstate Commerce Com. v. Stickney,* 215 U. S. 98; 30 S. Ct. 66, stating:

> "The carrier is under no obligation to charge for terminal services. *Business interests may justify it in waiving any such charge,* and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it." (Italics for emphasis.)

In this period of growing competition with motor trucks —such facilities reaching the loading and unloading platforms of the widely scattered industrial units—the expected tendency, dictated by prudent business economies, is to extend, rather than to diminish, terminal services of the kind here described; and so long as that policy, in its practical application, is kept free from unjust discrimination, the carriers are privileged to continue it, and the shippers are entitled to the benefits.

Assuming then, that the premises are correct, it follows that there is nothing, unlawful or inherently wrong with the practice, as such, of gratuitously rendering spotting services which, in measure and value, exceed those which reasonably may be demanded without

charge in addition to the regular line-haul freight rates; providing, of course, that the carriers' tariffs, in terms, meet the requirements of the statute and subject also to the modification already alluded to, that a rule or practice, *prima facie* lawful and reasonable, may, in its practical application, become unlawful and unreasonable, in giving rise to unjust discrimination, undue preference and undue prejudice—matters, which, however, are left for separate consideration.

Related to these services—and intentionally ignored up to this point, but now to have attention—are the instances where the carriers engage the industries to perform the work and compensate them out of their rates by payment of the so-called "allowances."

ALLOWANCES TO INDUSTRIES
IN LIEU OF SERVICES:

Fourth, whatever services the carriers themselves may be compelled to perform in conducting transportation—including the spotting of cars—they may engage others, including the shippers and owners of the property transported, to perform for them; and for that service they may pay reasonable compensation out of their freight rates without violating the law. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.,* 230 U. S. 247; 33 S. Ct. 916, 923, Interstate Commerce Act, Section 15 (13).

Unless excluded by express terms of the tariffs in which the applicable rates are published, such rates are deemed to include the placement, or "spotting," of cars on both the carriers' tracks and on private industrial tracks, within customary and reasonable bounds; and, of course, in positions accessible for loading and unloading, as heretofore stated. *Car Spotting Charges,* 34 I. C. C. 609, 616; *Interstate Commerce Comm. v. Stickney,* 215 U. S. 98; 30 S. Ct. 66. But they are not deemed to include special or particular spotting services of the

character elsewhere herein described, which the carriers may not reasonably be required to perform without charge in addition to their line-haul rates. Accordingly, the carriers may, in the form of allowances, pay shippers for the performance of spotting services which are deemed to be included in the tariff rates; provided only that such allowances are reasonable and published in conformity with the requirements of the statute. But they may not, lawfully, pay shippers allowances for special or particular spotting, not included in the line-haul rates, unless the undertaking to perform such special and particular services, and the allowance to be paid therefor when the performance is by the shipper, are both expressly defined and published in their tariffs. To make allowances for such services—or any other services—without observing the requirements of section 6 of the statute, would be a form of rebating.

The intended point of significance here, however, is that, if duly published in the manner prescribed by law, the carriers are free to perform such special and particular services, or to engage the industries to do the work for them, in return for *reasonable,* not excessive, compensation; subject always to the inhibitions against unlawful discrimination, undue preference or undue prejudice, to which attention will presently be given.

An allowance which exceeds reasonable compensation to the industry, for the spotting service performed by it, generally tested by the operating costs incurred, including a fair return on the investment in property devoted to such work, may be the equivalent of a rebate. *Mitchell Coal Case, supra.* What is, or what is not, reasonable, is an administrative question for determination by the Commission. Such allowances need not be equal in amount, for, to make them so, would, in many instances, give rise to prohibited discrimination. Gen-

erally speaking, they should not exceed the cost to the carriers of performing the services.

DISCRIMINATIONS, PREFERENCES, ADVANTAGES AND CONCESSIONS:

Fifth, all discriminations, preferences and advantages are not unlawful. *Nashville C. & St. L. Ry. v. State of Tennessee,* 262 U. S. 318; 43 S. Ct. 583. To be unlawful they must be undue, unjust, and unreasonable, to the extent of violating the spirit and purpose of the regulating statute; that is, they must in measure and effect be repugnant to the legislatively declared public policy. The standards of what are and what are not undue, unjust, and unreasonable, are not precisely defined by statute, any more than are "special" and "particular" spotting services. Violating the express terms of published tariffs, in reference to rates, rules, regulations, or practices—thus *ipso facto* resulting in prohibited discrimination—is, of course, *malum prohibitum;* but, as before indicated, unlawful discriminations, preferences, and advantages, in the nature of concessions, take many forms which are not in violation of specific tariff terms, and are dependent upon the particular facts and circumstances of each case. For example, to furnish expedited services in transporting live stock was found to be an unlawful preference, sufficiently so to avoid a contract to furnish such services and to protect the carrier against damages for breach. *Chicago & A. R. Co. v. Kirby,* 225 U. S. 155, 32 S. Ct. 648. An agreement to furnish cars for loading live stock on a day certain, including of course the placement of them for loading, was declared to be an unlawful preference. *Davis v. Cornwell,* 264 U. S. 560; 44 S. Ct. 410. These matters did not depend upon express terms of the tariffs, but rather upon the nature and extent of services customarily and ordinarily rendered, and which reasonably could be de-

manded, as a common-carrier duty in conducting transportation at the lawfully established rates. The *General Electric Case, supra,* was of the same nature, where the extent to which the carrier would go in "spotting" cars was not, in terms, defined in the tariff, but depended upon the kind and extent of such services which reasonably could be demanded at the established transportation rates. Similarly, the violation of a service order, not embodied in the tariffs and wholly apart from the transportation rates, was held to be an undue preference, or "concession," constituting a public wrong and subject to the penalties of the Elkins Act. *United States v. P. Koenig Coal Co.,* 270 U. S. 512; 46 S. Ct. 392; *United States v. Michigan Portland Cement Co.,* 270 U. S. 521; 46 S. Ct. 395. There are numerous incidents of service in conducting transportation, including the "special" and "particular" spotting of cars, which have not the effect of violating specific tariff terms, but which in substance are effective in giving unlawful preferences. Authorities in great abundance are cited in the Interstate Commerce Acts, Annotated, Vol. 4, Elkins Act, (p. 2747 to 2787), which need not be repeated here. It happens also that unlawful preferences result in applying the express terms of the tariffs, where the prescribed and published rules or practices are established towards that end. *Merchants Warehouse Co. v. United States,* 283 U. S. 501; 51 S. Ct. 505. Typical of this situation is a recent case decided in July, 1932, *Loading and Unloading Freight by Cranes,* 186 I. C. C. 247. Compare a somewhat reverse situation, where the carrier attempted to assess rental charges for use of its locomotive in spotting cars, when such services, although not specified in the terms of the tariffs, were nevertheless deemed to be included in the transportation rates. *Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co. Inc.,* 270 U. S. 260; 46 S. Ct. 220.

Discriminations and preferences of the kind just described, to make them unlawful and subject to the penal provisions of the statute, need not be associated with, and are not dependent upon, the concurrent presence and effect of specific undue prejudice, as an essential concomitant. They are not subject to alternative corrective orders, in the sense of leaving the carriers to choose whether they will remedy the public wrong by extending the preference to all, or by withdrawing it altogether. Neither is it a prerequisite for the purpose of establishing that the preference is unlawful to show that commercial competition exists, as between the persons having the benefit of the preference and others engaged in like business and similarly circumstanced. The general showing of inequality resulting from favoritism in granting a concession from customary and normally prevailing practices is sufficient. *Davis v. Cornwell, supra; Merchants Warehouse Co. v. United States, supra; United States v. Pennsylvania R. Co.*, 266 U. S. 191, 199; 107 I. C. C. 119 (*York Switching Case*); *Louisville & N. R. Co. v. United States* (*Private Office-Car Case*), 282 U. S. 740; also 282 U. S. 760; *Louisville & N. R. Co. v. United States*, 238 U. S. 1; 35 S. Ct. 696 and numerous other authorities which need not be cited.

On the other hand, there are a large group of cases in which the Commission—charged with the duty of determining issues of unlawful discrimination, preference, and prejudice, as questions of ultimate fact—have found undue preferences to exist in the particulars of departures, by way of concessions, from normally prevailing, customary, and reasonable standards in matters of rates and practices, but have left the carriers free to choose between extending such preferences to all shippers similarly circumstanced, or withdrawing them from those favored. A clear example is *Jacksonville Traffic Bureau v. Seaboard Air Line Ry. Co.*, 178 I. C. C. 634,

decided October 7, 1931. More directly related to the questions here under consideration, however, are about 100 cases, extending over a period of almost two decades, where questions of unjust discrimination, undue preference and undue prejudice, in making allowances to industries for spotting cars on private industrial tracks, have been decided in the alternative, giving to the carriers the liberty of extending the preferences to all, if they chose that manner of curing the law violations. The citation of a typical case, which affected one of the industries (No. 155) included in this investigation, will suffice. *Carey Mfg. Co. v. Director General,* 59 I. C. C. 640. These cases are of major significance in relation to this inquiry, in the sense that they permit the carriers, without charge in addition to their line-haul rates, to perform, or pay for, services, not included in their established line-haul rates, of the special and particular nature described elsewhere herein. *General Electric Case, supra,* and despite the fact that, in terms, the tariffs do not provide for such services.

But there is another line of cases which has dealt with discriminations, preferences, and advantages, including apparent "concessions," which were held to be not undue, or unreasonable, and therefore not unlawful. Important and typical among these are the so-called elevation cases. *Union Pacific R. Co. v. Updike Grain Co.,* 222 U. S. 215; 32 S. Ct. 39; *Interstate Com. Com. v. Diffenbaugh,* 222 U. S. 42; 32 S. Ct. 22; *Interstate Commerce Comm. v. F. H. Peavy & Co.,* 222 U. S. 42; 32 S. Ct. 22. In the first of these cases the Supreme Court of the United States took occasion to point out, in reference to section 3 of the Interstate Commerce Act, and as bearing particularly upon the subject of undue preference, that:

> "The statute must be taken as a legislative recognition of the long continued practice, and a declaration that the *incidental advantages* derived

by the owners were not undue." (Italics for emphasis.)

This statement had reference to the "incidental advantages" inuring to the benefit of the owners of grain in the cleaning and grading of that product as it runs through the elevators in the course of transportation, and for which the carriers paid the shippers (owners) an elevation allowance presumed to include the cleaning and grading services. Similar "incidental advantages" were acquired by Arbuckle Brothers, dealers in sugar and coffee, with a place of business, including warehouses, wharves, lighters, and floats, within the lighterage limits of New York Harbor on the East River. Those facilities, or substantial parts of them, were let unto the use of a Terminal Company, created and owned by Arbuckle Brothers. The Terminal Company, known as the "Jay Street Terminal," in turn became the agent of the carriers having rail-ends on the Jersey City side, under a contract to serve those carriers, through use of the described facilities, in receiving and delivering freight at the "Jay Street Terminal," and transferring it between there and the Jersey side by lighters or floats. For that service the Terminal Company received allowances of from 3 to 4½ cents per 100 pounds, depending upon the origin or destination of the traffic, including the sugar and coffee traffic of Arbuckle Brothers, which composed about one-third of the total traffic handled through the Jay Street Terminal. The arrangement was duly covered by tariff, and its effect was indirectly to make allowances to Arbuckle Brothers on their own traffic for the services of taking it from and delivering it to the railroads on the Jersey side. Like services were denied to a competitor, the Federal Sugar Refining Company, located beyond the prescribed lighterage limits, but were indiscriminately given to all shippers of all commodities located within the lighterage limits. In

practical operation the Jay Street Terminal was in fact a public depot of the railroads, open to all shippers alike, but located upon the property of, and operated indirectly by, Arbuckle Brothers. The competing Federal Company undertook to offer and receive its traffic within the defined lighterage limits, so that it, too, could demand allowances similar to those paid indirectly to Arbuckle Brothers; and it chose for that purpose Pier 24, on which it had an office building. But that, unlike Jay Street Terminal, was not a public railroad depot. Besides, the process employed was fictitious; no real deliveries or acceptances being made of the Federal Company's traffic at Pier 24. Nevertheless, in that circumstance, the Commission found that Arbuckle Brothers were indirectly being given an undue preference, and ordered the carriers to cease and desist therefrom, or, alternatively, to make like allowances to the competing Federal Company (20 I. C. C. 200). In reversing the Commission, *United States v. Balt. & Ohio R. R. Co.*, 231 U. S. 274, the Supreme Court of the United States took occasion to observe (pp. 289, 290):

> "The order of the Commission is made to rest upon an erroneous assumption that the service performed by Arbuckle Brothers in respect of their own west-bound shipments of sugar after the delivery of such sugar at this station (Jay Street), is *a shipper's service done for their convenience*, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation unless (alternatively) a similar compensation is allowed to the Federal Sugar Refining Company for lighterage of its sugar to the west-shore terminal railroads.
>
> That *certain advantages inured to Arbuckle Brothers* from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, is obvious. That this was a consideration which operated as an inducement to make these contracts

(agency contract with the Arbuckle owned Terminal Co.) may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they (Arbuckle's) were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But *these were business considerations* which are far from showing *any purpose to give them any illegal preference*, or to discriminate against other shippers." (Italics for emphasis.)

The foregoing case is covered here in considerable detail because it is important among the group of cases which mark and separate "incidental advantages," that may be acquired in conducting *bona fide* common-carrier services, from "undue preferences" and follows consistently the reasoning of Justice Cardozo in the *General Electric Case, supra,* hereinbefore alluded to, who described the "test," or dividing line, as "vague"; also because it relates to terminal services quite analogous to "spotting" services, performed by shippers to whom allowances, at least indirectly, are paid as compensation for receiving and delivering property at the door of the industry. It is significant in relation to the "incidental advantages" that may inure to some industries in receiving the so-called "special" and "particular" spotting services because of their large volume of business, the lay-out and capacity of their tracks, and other considerations, as well as in relation to the "good business" policy of the carriers in rendering such services without charge in addition to their line-haul rates, to all shippers and industries that have need for them.

CUSTOM AND PRACTICE:

Sixth, in ultimate aspects the questions raised upon the record in this proceeding are neither administrative nor ministerial, but questions of law. Neverthless, the determination of them requires preliminary examination and decision of administrative questions which are not susceptible of conclusive answer from the express terms of the carriers' published tariffs. *Great Northern Ry. Co. v. Merchants' Elevator Co.,* 259 U. S. 285; 42 S. Ct. 477; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.,* 234 U. S. 138; 34 S. Ct. 885, 888, 889. The administrative question here presented inquires into the measure and kind of "spotting" service included in the line-haul rates. As before indicated, there is no precise definition, either in tariff terms or by "rule-of-thumb", which accurately and inflexibly marks the limits of "ordinary" spotting services that are deemed to be included in the line-haul rates; or which, by precise classification or measurement, defines "special" or "particular" spotting services which are deemed not to be included in such rates. This observation is identified as closely with the payment of allowances as with the performance of the services by the carriers. Perhaps the most outstanding guide-post and typical example of the distinction between the two classes is the anaylsis by Justcie Cardozo, in the *General Electric Case, supra,* reviewed by the Supreme Court of the United States on a petition for *certiorari*[3]; that petition having been de-

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[3] In *Vogt & Sons v. C., B. & Q. R. Co.,* 181 I. C. C. 151, it is pointed out that "the denial of such a petition imports no expression of opinion upon the merits of the case." *United States v. Carver,* 260 U. S. 482. That citation was there made as justification for disregarding the opinion below of the Federal Court which was in conflict with many opinions of the commission on the same issue raised in the so-called combination rule cases. Other opinions of the commission cite the denial of the writ as if it had the authoritative weight of the Supreme Court of the United States in affirming the opinion and judgment of the lower court.

nied because no errors of fact or law were apparent in the opinion and judgment below.

The "ordinary" and customary spotting services, generally conceded to be included in the line-haul rates —spoken of and described at times in the authorities as the equivalent of, or substitute for, like spotting services on the carriers' public team tracks—are not open to question in this proceeding, and could be left out of view altogether were it not for the importance of distinguishing them from the "special" and "particular" spotting services. It is this latter class of services, apparently of special benefit and value to industries having many separate plant units, scattered over wide areas, and connected by systems of industrial tracks, to which it is understood that this inquiry is principally, if not exclusively, directed. The question is, are such services, along with "ordinary" spotting services, also included in the line-haul rates? The "ordinary" services are deemed to be included in the line-haul rates by virtue of *custom* and *practice*. Are the "special" and "particular" services included in those rates by virtue of the same rule for the same reason? The carriers, as before indicated, are at liberty to render such services without charge in addition to the line-haul rates. They may not be compelled to render them, but may do so voluntarily; and if it has been their custom and practice voluntarily to do so—whenever and to the extent called upon without discrimination as between shippers, localities, or particular descriptions of traffic, and wherever physically possible of performance—then such services are included in the line-haul rates by force of the identical

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Although the denial of such a writ imports no expression of opinion on the merits, it nevertheless is an expression of opinion by the high court that no error of fact or law is apparent in the decision of the lower court, despite the efforts of the petitioner to prove otherwise; and it is in that sense that the denial of the petition is here cited.

and precise tests which bring the "ordinary" spotting services within those rates. In relation to both classes of service the test is the prevailing custom and practice.

Broadly stated, in relation to both official and western classification territories, but allowing for minor exceptions of insufficient importance to specify, the evidence—weighed chiefly from the testimony of experienced and practical railroad operating officials in intimate and constant touch with the operating performance—is that the carriers recognize no distinction as between the two classes of service, and never have. Where the nature and volume of the business, the layout and capacity of the private industrial tracks, and efficient and satisfactory service to the industries, require and justify, they "spot" the cars on the private industrial tracks in accessible positions for loading and unloading where, and as wanted, by the industries, and, as nearly as may be, to meet the conveniences of the industries. For the most part these services are described to be mutually advantageous, rather than burdensome; and as a whole the industries have made no complaint concerning them. Thus, when tested by prevailing *custom* and *practice,* which governs "ordinary" spotting, the conclusion must be that, excepting where in express terms the carriers' published tariffs provide otherwise[4], the so-called "special" and "particular" spotting services are also included in the line-haul rates.

In southern classification territory the policy and practice of the carriers is somewhat different. in that territory there are relatively few industries which have extensive systems of private industrial tracks. For the

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4 Iron ore is subject to a terminal charge, in addition to the line-haul rates for spotting services, under the terms of the Commission's findings and order in the *Iron Ore Cases,* 41 I. C. C. 181.

most part these are the iron and steel industries in the vicinity of Birmingham, Ala., although there are some others. In those instances the carriers deem their common-carrier duty completely accomplished in leaving and taking cars from the designated interchange yard or tracks either just inside or outside the confines of the industrial plants. In other words, they do not customarily render "special" and "particular" spotting services, and therefore such services, in that territory, are deemed not to be included in the line-haul rates either by virtue of custom and practice, tariff terms, or any other rule. An outstanding exception to this general policy, attends the transportation of lumber and lumber products from the so-called "yellow pine blanket" of the south and south-west, attributable to the findings of the Commission and the Supreme Court of the United States in the *Tap Line Cases,* 234 U. S. 1. The lumber rates maintained by the carriers generally apply from the lumber mills, often located some distance from the trunk-line tracks on "tap-lines" owned by the industries and operated as common carriers, or on private industrial tracks owned by the mills. The rates include the services of bringing the lumber from the mills to the junctions with trunk-line tracks; and, of course, include also the "spotting" services at the mills.

These observations as to the general policies and practices of the carriers in the respective classification territories, purposely omitting insignificant departures in particular situations, lead to an examination of the facts and circumstances which gave rise to the representations and suggestions that the performance of the described services are attended by what seemingly are unlawful inequalities, discriminations, preferences, and perhaps unduly burdensome against the railway operating expenses and revenues. Having described generally

the prevailing *custom* and *practice* attention will now be given to these other subjects.

REPRESENTED INEQUALITIES, DISCRIMINATIONS, PREFERENCES, ETC.

Seventh, in approaching these subjects it is not the intention to make specific findings of fact, relating separately to the many individual industries within the scope of this inquiry; nor is it the purpose to analyze the few scattered instances of what may appear, in at least a *prima facie* sense, to be violations of the law in one particular or another. Only those facts and circumstances which establish differences in treatment, and fall within the general practices and policies of the carriers, as related generally to all industries, will be given attention. These divide themselves naturally into two groups; for convenience, designated as groups A and B and described as follows:

Group A: Relating to the obstacles of interference which obstruct and prevent freedom of access to and operation on the private industrial tracks by the carriers' locomotives, for the purposes of performing the spotting services, as more particularly described at pages 6, 7 of this memorandum.

Group B: Relating to the allowances made by the carriers to the industries, where the spotting services are performed by the industries with their own power; including the different bases, restrictions and limitations, applied in making such allowances; also the circumstances under which they are denied.

First, as to Group A: The evidence establishes many instances where, for preferential reasons of their own, the industries, with their own power, perform their own spotting services. They neither ask nor receive compensation from the carriers for their work, assuming the cost thereof as an incident to their industrial operations. In these instances the carriers leave and

take the cars at or near the industrial plant gates on designated interchange tracks, going as far as desired and permitted by the industries. Obviously there is nothing wrong with this practice, and it may be eliminated from further attention.

The evidence further establishes that there are a great many instances where—due to lack of adequate maintenance, excessive curvatures, light weight of rail, numerous cross-overs, turn-outs, switches, or other obstacles—the physical conditions of the private industrial tracks are such that they either will not accommodate the carriers' power or cannot be used by that power without hazard or excessive delay. There is discrimination by the carriers in dealing with such situations, doubtless justified in some instances, but not in others. Of course, due to the described physical disabilities, the carriers do not undertake to perform the spotting services. The industries, with their own power, do the work, but the discrimination lies in the fact that in the case of some industries so circumstanced, the carriers refuse allowances upon the ground of being unable, as a physical matter, to perform the spotting services to which these industries would otherwise be entitled, while in the case of other industries, having tracks unfit to accommodate the carriers' power, compensation is granted by the carriers to these industries for performing their own spotting services. In some such situations, there seems to be no valid ground for this difference in treatment, while in other instances, justifying reasons are apparent.[5] For example, there are instances where the defects in the industrial tracks are susceptible of elimi-

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[5] Typical are Marion Steam Shovel Co., Marion, O., (Industry No. 124), compared with the Osgood Company (Industry No. 670), both served by the C. & O., and the tracks at both plants being defective. Both industries are engaged in like business; one being paid an allowance and the other not. (Record P. 6065 to 6096; and 6626 to 6634.)

nation by applying a higher standard of maintenance, substituting heavier for lighter rail, straightening, out curves, and the like; and where if such defects were removed, the industries clearly would be entitled to have their spotting services performed by the carriers at the line-haul rates. Studies in many such instances have developed that even if the industries went to the additional expense of removing the physical defects, it would still be less costly, and therefore more economical to the carriers, to make allowances to the industries for performing their own spotting services than for the carriers to undertake to do it with their own power. The factors of economy, both to the industries and the railroads under such circumstances, are the lighter power used by the industries, the use of fewer men in operating their industrial engines, the lower wage-scales paid their locomotive crews, the excess operating expenses incurred by the railroads in operating switch engines between remote base yards and the industries, etc. In the light of such known results, the granting of allowances is justified by ordinary business prudence and economy. There are other instances where the defects in the private industrial tracks are of a nature that could not be eliminated without the remodeling or rebuilding of the entire industrial plant, such as sharp clearances close to plan buildings. Discriminations of the kind here described are not established as being either wide-spread or of important effect and consequences. No one was heard to complain about them. The slight advantages and disadvantages which may arise as between industries from the described differences in treatment actually spring from considerations attending the physical situation existing at each industry for which the industry, not the carriers, should assume full responsibility. Individual instances of undue preference or undue prejudice might result from such discrimination; but the

practice, as such, supported by the reasons here shown, is not in and of itself unlawful or otherwise open to censure.

Another form of interference within Group A, of which some notice was taken, are the circumstances where many of the larger industries, having extensive systems of private industrial tracks, are served by two or more carriers, and, in their industrial processes, operate their own locomotives on such tracks in performing intra-plant industrial movements. Under such circumstances, it is frequently impossible, as a practical matter, for the engines of each carrier to enter upon the private industrial tracks for the purposes of spotting cars without encountering some degree of interference by the power of other carriers occupying the private industrial tracks for the same purposes at the same time, or by the power of the industries engaged, concurrently, in the performance of intra-plant services. In overcoming that situation, arrangements are often made, as between the carriers, for the joint performance of the spotting services by a single carrier, for itself and all the others, prorating the operating costs between them upon basis of the cars handled for each. In some cases the joint engine also performs the industrial intra-plant movements, at the established tariff rates for that service; thus reducing the operation on the private industrial tracks, for all purposes, to the most efficient and economical basis. That practice, of course, is to be commended. In some cases the entire work, including spotting for the carriers and intra-plant service for the industries, is performed by the industry with its power. When that is done the carriers make allowances to the industries as compensation to them for the "spotting" services. Generally, these allowances are sufficient to cover only the cost, and more often are less than the cost, to the industry of performing the "ordinary" spot-

ting services included in the line-haul rates; and as a rule are substantially less than it would cost the carriers to render like services with their own power. This, too, is a commendable practice, mutually beneficial, from the standpoint of efficiency and economy. The question arising in connection with it is whether the carriers should either perform, or pay for, such services because each of them, as a practical operating matter, do not have freedom of access to and from the spotting locations at their own convenience and on their own schedules without encountering the described interferences and interruptions; the point being that, under such circumstances, the services beyond the gate of the plant, on the industrial tracks, exceeds, at least in cost, the "ordinary" spotting services within the line-haul rates. But, as previously explained, the carriers are at liberty to render such services without charge in addition to their line-haul rates, and are doing so as a matter of prevailing and long continued custom and practice. Even if they discontinued such services, and refused to pay for them out of their rates under the circumstances stated, the industries could easily meet the situation by patronizing only one of the several carriers having track connections with the industry thus forcing the others, if they desired any of the traffic, to absorb the switching charges of the patronized carrier. In that manner the carrier chosen by the industry for patronage would be required to perform only "ordinary" spotting services included in the line-haul rates, and could accomplish that work without any of the described interferences or interruptions. The carriers' practice seems not to have any unlawful effect, especially in view of the fact that the allowances, where made, are based on the costs of "ordinary" switching, only.

Next, concerning another form of interference closely associated with the instances where the industries

prefer to perform their own spotting services with their own power, but neither ask nor receive allowances from the carriers: There are of record a number of cases where, although the carriers stand ready, able, and willing, to perform the services, the industries apparently refuse to let them do it, and will not permit the carriers' locomotives to enter on the private industrial tracks for that purpose. Those industries are neverthless paid allowances by the carriers. These instances are where all of the carriers serving the industries do not have direct physical track connections with the private industrial tracks, and are under the disability of being required to engage, as a switching carrier, one of the lines which has direct physical track connection with the private industrial tracks. In such circumstances it is not the switching carrier which makes the allowance, but the carrier that engages the switching carrier; the allowance being granted to the industry in addition to absorbing the switching carrier's reciprocal switching charge. Where the switching charge includes the spotting services on the private industrial tracks, and the switching carrier stands ready to perform such services, but is refused permission by the industries, there is no justification for the payment of allowances to the industries by the line-haul carriers. In most of these cases, however, it appears that the allowances paid to the industries are substantially less than it would cost either the switching-carrier or the line-haul carriers to do the work; and this is generally true where the industries are willing to have the spotting services performed by the carriers. The fact that the line-haul carriers, rather than the switching-carrier, make the allowance, in addition to absorbing the switching carrier's charge, is not of special importance, since, if the switching carrier paid the allowances it would mean only that its reciprocal switching charge would be corresponding-

ly increased. There is nothing unlawful in this situation excepting where it is conclusively shown that the industries refuse to permit the carriers to perform the services in instances where the cost of performance by the carriers is less than the amount of the allowances paid to the industries. There are no such cases conclusively established by the evidence. The question is, where the carriers do not reach the industries by direct physical track connection—that disability having the same effect as where the private industrial tracks, although connected, are physically unfit—why should any allowance be made, and why should the carriers under such circumstances bear the expense of the spotting services? The answer is that the circumstances are not different, in practical effect, from the long continued custom and practice of the carriers in absorbing each others' switching charges for the purposes of reaching and serving industries off their own rails. Allowances of the nature just described are spoken of on the record as "over-head allowances," and have been induced largely by railroad competition. Some of them require closer analysis and examination, but that need not be done here.

Apart from the so-called interferences already specified—but in some particulars also within them—are those which the carriers themselves have earmarked and described in their formula, before mentioned, which is used as a basis for measuring the unit allowance, per car or per ton, to be paid the industries for performing "ordinary" spotting services. The engine-hour costs attributable to such interferences are excluded from the allowances and charged against the industrial plant operation; the effect of which is to pay the industries, which perform such services, for nothing in excess of the "ordinary" spotting. The discrimination, or difference in treatment, to be observed here is that where the carriers perform spotting services with their own

power, incurring the operating expenses incident thereto, the industries get the full benefit and value of such services—whether "ordinary" or "special" and "'particular"—without charge being made against them for the so-called interferences. That is to say, in practical operating performance by the carriers, no notice is taken of the described interferences or interruptions, which concededly are present in a greater or less degree at most of the industrial plants having extensive systems of private industrial tracks. Such interferences are said not to be constant and continuing from day to day, but for the most part are transitory, being present today and gone tomorrow, according to what is taking place in the industrial operations from time to time. Nevertheless, where the industries do the work, and are paid allowances therefor, the time cost of such interferences measured by what was encountered in a selected test period, are treated as if they were constant and continuing, by eliminating them from the amount of the allowance, per car or per ton, thereafter to be paid the industries whether the interferences are or are not actually encountered in the physical spotting performance. In this way the carriers procure spotting services, which otherwise they would themselves perform under the prevailing custom and practice, at a cost to them much less than would be, and generally is, incurred by them in their own operating performance. The kind of interferences and interruptions mentioned, and charged against the industries under the stated circumstances, are described in part as follows, viz:

	Description	*Chargeable to*
1	"Time for service in excess of normal operation"	Plant
2	"Time of interference and interruption by plant operations" ..	Plant

	Description	*Chargeable to*
3	"Time in switching and handling cars when held for advice from the plant as to disposition, or ordered returned for inspection, etc."	Plant
4	"Weighing for account of plant"	Plant
5	"Delay, interruption or interference by (plant) locomotive crane"	Plant
6	"Delays caused by locomotives engaged in work solely for the plant"	Plant
7	"Delay by maintenance or construction work (on plant tracks)"	Plant
8	"Waiting for locomotive at beginning of shift"	Plant, partially
9	"Taking fuel, water, sand and other supplies"	Reasonable time to overhead; remainder to Plant
11	"Waiting for orders"	Plant
12	"Cleaning fires"	Reasonable time to overhead; balance to Plant
13	"Minor adjustment or repair to locomotive during working hours"	Do
14	"Change of locomotives"	Do
15	"Lunch period"	Do
22	"Time during working hours when no work is assigned, and crew is waiting for assignments"	Plant

The foregoing are typical. In addition to them the formula provides for the assignment of other time to the plants. Important among the latter is the following:

> "13—Inbound cars held for disposition orders from the plant should be recorded as railroad cars up to the point where held; when moved from point where held to unloading point should be recorded as plant cars."
>
> "11—Loaded or empty inbound or outbound cars moved between the railroad interchange track and point of first placement for loading or unloading shall be recorded as railroad cars."

These last two rules, identified as numbers 13 and 11, as presently will be seen, are of significance when compared with the spotting services rendered by the carriers with their own power under circumstances where, of course, the industries, not performing the work, do not receive allowances. For example, in reference to the larger industries—where the number of inbound and outbound cars handled daily run into the hundreds, and where the carriers' locomotives ranging from more than one to twenty-five, and even more, are constantly engaged day and night in shifting and spotting cars for the plant, some in interchange service and others in intraplant service—the operating practice in physical performance is to trip to and fro between the interchange tracks and the locations of loading and unloading in placing the cars, as to commodities, quantities, and sometimes the grades, at the particular locations and at times desired by the industries. In other words, within the meaning of the rules herein identified as numbers 3 and 13, there is what appears to be a temporary setting-out and "holding" upon the interchange track connection or whatever system of set-out tracks may be assigned for that purpose, and a distribution from there to the locations of loading and unloading as desired by

the industry. No charge in addition to the line-haul rates is made for that service, and apparently it is furnished wherever needed by the industry and justified by the volume of traffic. Examples of such performance are those at the Chevrolet automobile plant at Detroit, the plant of the Illinois Steel Corporation at Gary, Ind., and the Homestead works of the Carnegie Steel Company at Pittsburgh, Pa. There are a number of others, to which special reference need not be made. The point for observation and emphasis, defining the differences in treatment, is that where such services are performed by the carriers with their own power, the entire cost is born by them in their operating expenses with no assistance or contribution from the industries in the way of a charge or otherwise; but, where the services are performed by the industries with their own power, the compensation they receive from the carriers for doing that work excludes the cost of all engine-hour time consumed in the process described in the foregoing rules. According to the formula, and the testimony concerning its application, the allowances cover only the cost of what has here been spoken of as "ordinary" spotting; all services in excess thereof, classified and measured under the terms of the formula, being borne by the industries. The discrimination is obvious, but—is it unlawful? The answer to that question is no; and the reasons for the answer are at least two. First, in hiring the industries to perform spotting services for them, or any other services for that matter, the carriers are free to bargain for the best available price and they do so, subject of course, to the statutory restriction that such allowances must not exceed a reasonable amount. Therefore, the lower the hiring charge, the greater the economy to the carriers. That is good business. The industries are not compelled to accept or agree to the compensation offered. They can insist upon the serv-

ices instead; that is, the same services which, under the prevailing custom and practice, are given to other industries similarly circumstanced. Second, where the industries do accept and agree to the offered compensation, excluded from which are the cost items chargeable against the plant under the adopted formula, it is because of the recognized benefits and advantages apart from the allowances which they derive from performing the services with their own power on a time schedule and orderly arrangement which more efficiently and effectively responds to the particular needs of the industry in its industrial functioning. For example, quite often the volume of traffic at a particular industry is not such as would require the constant presence of carrier power at the plant for spotting work, and the industrial work at the plant would have to be arranged so that the spotting services by the carrier could be accomplished in two or three switches a day on a schedule as convenient as possible to both the carrier and the industry. Under such circumstances, the industrial processes at times would suffer inconvenience and delay through inability to spot cars at times other than when the carrier power was present under the arranged schedule. On the other hand, when the industry has its own power and receives an allowance calculated on basis of the adopted formula, it is free to make use of that power in spotting cars in such quantities and at such times as may be desired to meet the special needs of the plant operation, which might mean a factor of considerable economy in manufacturing costs. In this observation it should be remembered that, in nearly all cases of record where allowances are granted, the amount of those allowances are less than the operating costs which would be incurred by the carriers if they, with their own power, performed the services. Thus, even where the industries accept allowances on basis of the described

formula—generally less than the operating costs to them of performing the services—the agreement as between them and the carrier is one of economical benefits to both. This is viewing the situation generally, not specially, and leaves out of consideration any specific situations where the practice apparently gives effect to discriminations which, in turn, seemingly result in undue preference and undue prejudice. This question, like most others related to the car-spotting services, is local in nature and must be examined in the light of the particular circumstances and conditions existing at each separate industry. It should be added that, as related to the total number of industries within this inquiry, there are comparatively few where the carriers find occasion to assign one or more locomotives for the exclusive services of spotting cars at particular industries, and that where such assignments are made—chiefly to the iron and steel industries, but also including some others among which are a few of the automobile industries—they are unquestionably justified by the daily volume of traffic. Broadly stated, there is nothing unlawful associated with or effected by these described practices.

Coming now to Group B, which relates to the represented inequalities, discriminations, or differences in treatment, as between industries arising from the different bases used in determining the amounts o the allowances; the restrictions and limitations imposed by the carriers in granting such allowances; and the circumstances under which they are denied. First, as to the different bases: As elsewhere stated herein, of the carriers operating in official classification territory, those in eastern trunk-line territory and some in central freight association territory, base the amount of the allowances to iron and steel industries on the costs of material and labor which prevailed in the years 1915-1916; whereas many of the central freight association

lines, especially those serving the iron and steel industries in the Chicago district—which also include some of the carriers whose lines extend from that territory into eastern trunk-line territory—base the allowances on current costs. That is, the costs current at the particular time the cost-study tests were made. In some instances the allowances, to both iron and steel industries and to industries engaged in other lines of business, are limited to specified maximum amounts, while others, not likewise limited, are based on the actual costs current at the time the services are rendered, and vary from month to month according to the volume of traffic, price changes, etc. In these aspects, the measurement and bases by which the allowances are gauged, are neither uniform nor inflexible. Generally they are, and doubtless should be, upon basis of the best bargain the carriers can make within the law. This question has previously been examined herein and requires no further consideration other than perhaps to repeat that the described differences in treatment apparently are without unlawful effect, although it is possible that unlawful preference or prejudice might result in some particular instances. These of course would require special attention not here intended.

Second, as to the policy of the eastern trunk lines in undertaking to restrict the payment of allowances to iron and steel industries: According to the evidence of the carriers' own operating officials, this policy is clearly unjustified. The test is not, and should not be, the kind of business in which a particular industry is engaged, but rather, whether it is more economical to the carrier to hire the industry to perform the spotting services than to themselves perform it with their own power and crews. Apparently the operating officers have had little or no voice in determining such questions although primarily and ultimately they are, in their very essence,

operating considerations. Again, this particular policy or undertaking is not rigidly observed. The carriers which have adopted it frequently yield to industries other than those engaged in the iron and steel business, but only upon authority of their traffic executives. There are described of record instances where allowances have been declined to industries on the sole ground that they were not engaged in the iron and steel business. Whether the effect of such denials was to violate section 3 is another question, not susceptible of determination from the facts of record.

Third, in relation to the refusal to grant allowances on other grounds: Most of such refusals were based upon the alleged inability of the carriers, with their own power, to enter upon the private industrial tracks for the purposes of performing spotting services to which the affected industries would otherwise be entitled under the prevailing custom and practice. These too have been described elsewhere herein and do not require further consideration excepting to observe that inequality and discrimination, in some instances apparently to an unlawful degree, have resulted from denying allowances to some industries for the stated reasons, and granting them to others where like defects existed in the private industrial tracks.

IN CONCLUSION:

The evidence, as a whole, indicates that there is little if anything wrong with the present practices of the carriers in rendering these spotting services, or in paying industries reasonable compensation for performing them. Certainly they have not been proven burdensome against the railway operating revenues or operating expenses; and, allowing for the comparatively few questionable instances, these described practices have not been found generally unlawful. In some par-

ticulars they leave at hand ready means for practicing discriminations which might reach unlawful proportions and effect, but such opportunities are open in reference to practically all incidents of conducting transportation. The evidence will not support any recommendation to lessen the extent of the spotting services now being rendered by the carriers, or to impose any charge therefor in addition to the line-haul rates. The economy gained by the carriers through engaging the industries to perform the spotting services, the volume of traffic gained and retained against competition with motor trucks through rendering a store-door delivery, and the efficient rendering of services, responsive to the needs of the industries, are the ultimate facts of importance and weight established by the evidence.

In fact, what in prior years might justly have been classified "special" and "particular" spotting services—then possibly more or less burdensome and costly to the carriers—have in many cases disappeared and become no longer necessary because of the more modern methods adopted in the industrial operations at the larger plants; particularly at the iron and steel industries.

Only three suggestions for improvement present themselves. *First*, to give to the operating officials authority to determine where economy can be effected to both the carriers and the industries by engaging the industries, where practical and less costly, to perform the spotting services. *Second*, to abandon the policy of attempting to restrict such allowances to the iron and steel industries. *Third*, to require that, in express terms, the carriers' tariffs specify the instances where their line-haul rates do not include the complete spotting services.

Respectfully submitted,

HAGGERTY AND GWYNN.

EXHIBIT 3.

The views of the Interstate Commerce Commission after a thorough investigation of the subject in 1915, as reported in *Car Spotting Charges,* 34 I. C. C. 609.

INVESTIGATION AND SUSPENSION DOCKET NO. 435.
CAR SPOTTING CHARGES.

Submitted April 23, 1915. Decided July 6, 1915.

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1. Tariffs proposing a "spotting charge" for placing cars for loading or unloading at convenient points on the tracks of industries specifically named in the tariffs found not to be justified for the reason that the proposed charge would apply in many cases to services covered by the line-haul rate, and also for the further reason that to impose the additional charge upon the industries named in the proposed tariffs and not upon other industries for which like services are performed would result in unjust discrimination.
2. The line-haul rate covers the customary movement of cars over industry tracks incident to the receipt and delivery of carload freight at convenient points on those tracks for loading or unloading without regard to the size or complexity of the industry, and the points at which the cars are to be placed by the carrier for that purpose without additional charge are to be determined by general usage.
3. The line-haul rate covers only one placement of a car upon an industry track for loading or unloading, and an additional charge should be made for each additional placement of a car for that purpose, as also for the movement of cars from place to place within the plant during the processes of manufacture.

REPORT OF THE COMMISSION.

MEYER, *Commissioner*:

This proceeding involves the propriety and reasonableness of a proposed charge for placing cars upon industry spurs or private sidings, or upon the tracks of industrial plants, at convenient points for loading and unloading, and for the movement incident thereto over the track or tracks of the industry. This charge, which is called a spotting charge, is proposed by the principal railroads in central freight association and trunk line territories and the New York, New Haven & Hartford Railroad in New England, by their individual tariffs filed with the Commission to become effective at different dates from April 20, 1914, to July 15, 1914, inclusive. The effective dates of the tariffs which were filed to become effiective prior to July 1, 1914, were postponed to that date by the voluntary act of the carriers, and upon protests from many classes of shippers all the tariffs were subsequently suspended by the Commission. The respondents announce in the suspended tariffs that they were filed to comply with a suggestion of the Commission in the *Industrial Railways case*, 29 I. C. C., 212. The proposed spotting charge is 5½ cents per ton, minimum $2 per car, and the service for which the charge is proposed is defined in the suspended tariffs as follows:

"Spotting" service is the service beyond a reasonably convenient point of interchange between road haul or connecting carriers and industrial plant tracks, and includes:

(*a*) One placement of a loaded car which the road haul or connecting carrier has transported, or

(*b*) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier.

(*c*) The handling of the empty car in the reverse direction.

The industries to which the charge applies are divided into three lists. The first of these lists appears in the tariff of the Pennsylvania Railroad Company, which may be taken as typical, under the heading:

List of industries having "industrial plant tracks" connected with the tracks of these companies on which these companies performed spotting service in the past and on which they will, if desired, continue to perform such service on and after the effective date of this tariff at the charge provided herein.

The second list appears in the same tariff under the heading:

List of industries having "industrial plant tracks" connected with the tracks of these companies on which the industry has performed spotting service in the past. The charge of these companies for performing spotting service for the industry on its plant tracks connecting directly with the tracks of these companies will be as per this tariff, provided the performance of this service by these companies is shown to be practicable and is agreed upon.

The third list appears under the following heading:

List of industrial railways (incorporated). These companies will perform "spotting" service on or over the tracks of these railways only by special agreement.

Some of the suspended tariffs do not contain the third list.

The basis of selection of industries, if there may be said to have been any such basis, varied with the different respondents. The necessity for an intraplant service in addition to the movement of cars incident to the receipt and delivery of carload freight seems to have been controlling in some cases, but in general the industries were arbitrarily selected, and range from the ordinary mill or factory with a single spur or private siding to the large iron and steel industries having an interior system of rails called a plant railway.

Considerable testimony was presented by both respondents and protestants with reference to the physical layout of the tracks over which the service is performed, the character and extent of that service, and the approximate cost thereof.

It does not appear that the terminal facilities of the respondents, exclusive of industry spurs, private sidings, and tracks of industrial plants, are now adequate for the receipt and delivery of all carload freight which they have been accustomed to receive and deliver upon such tracks at convenient points for loading and unloading, and respondents do not show that they could provide such terminal facilities, but some of the protestants testified that if such terminal facilities were provided by the carriers they would not use them.

It is admitted by the principal respondents that the proposed charge and also the lists of industries named in the tariffs are tentative merely, and that if the tariffs should take effect as filed unjust discrimination would result in that there are many industries not named in the suspended tariffs for which the respondents perform without an additional charge therefor the same service for which they propose to require the industries named in the suspended tariffs to pay the spotting charge in question. But while these respondents concede that the proposed tariffs can not be justified, they ask us to indicate how far they may go in imposing spotting charges.

One of the respondents, the Chesapeake & Ohio Railway Company of Indiana, insists that its proposed charge is justified by the mere fact that the industries upon which it proposes to impose the charge are located upon a private track which it does not own or control, and which is not a part of its terminal facilities. This respondent concedes that the line-haul rate covers the

transportation to and from the point of connection of its tracks with the track on which the industries are located and which it claims to be a private track, but it insists that it has no right to perform any service over a private track without making a charge therefor in addition to the line-haul rate, and that it not only may but must add to the line-haul rate a reasonable charge for the switching of cars between the industries in question and point of connection of its tracks with the track on which the industries are located.

The protestants insist not only that the proposed tariffs can not be justified, but that the line-haul rates cover the placement of cars upon industry tracks at convenient points for loading and unloading without regard to the size of the plant or the ownership or control of the tracks over which the cars are moved, and that no charge for the spotting service in addition to the line-haul rate could be justified.

It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate, and in the *Los Angeles case*, 18 I. C. C., 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. *Los Angeles case* 234 U. S., 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads

may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an industry spur, or a private siding, nothing should be added to the charge for the line haul.

As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary.

While we have from time to time called the attention of the carriers to the possibility of increased revenues from certain sources, and have suggested that it might be that the carriers ought to make a charge in addition to the line-haul rate for some services in connection with the movement of cars within industrial plants, for which no such additional charge is now made, we have never intended to suggest that an additional charge would be proper for services which by long continued general custom and usage have been treated as covered by the line-haul rate.

In *General Electric Co. v. N. Y. C. & H. R. R. R. Co.*, 14 I. C. C., 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, but the case did not require a decision of that question. The point actually decided was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it to permit the carrier to perform the service. In that case the Commission said (p. 244):

The complainant is not entitled to compensation as demanded by it in the complaint or on any other ground developed upon the record. It assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give the complainant a reasonably good service in that respect, but simply because the growth of its business to vast proportions, the multiplication of its buildings, and the extension of its switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under the obligation to do, but which it does not and could not permit them to do. On that ground alone the complaint is without merit. Relief against a defendant must ordinarily be predicated upon his failure or refusal to do what he is legally bound to do and not upon the fact that the complainant has volunteered to do it for him.

As said by the Supreme Court in *Atchison Railway Co. v. United States*, 232 U. S., 199, 214, whatever transportation service or facility the law requires the carriers to supply they have the right to furnish, and it does not follow, therefore, that because the line-haul rate

covers the movement of cars incident to the receipt and delivery of carload freight on industry spurs, or on the interior tracks of industrial plants that the owner of the property transported may in every case receive an allowance from the carrier when he performs that service.

In *Industrial Railways case,* 29 I. C. C., 212, the Commission also expressed the opinion that the line-haul rate does not cover the movement of cars incident to the receipt and delivery of carload freight at large industrial plants where the movement is through a network of interior tracks, but in that case also the question presented was one of allowances, and we did not undertake to determine the number of tracks over which the cars must move prior to their receipt or delivery by the carrier in order to deprive the owner of the property transported of the right to an allowance for the service. We did, however, in that case recognize the fact that the line-haul rate may cover the service of spotting a car at the factory door on a private siding, as we there said (pp. 225-226):

Under the common law as construed in the practically unanimous decisions of the courts, a delivery of carload freight to a shipper having a private siding is made by shunting the car upon the switch, clear of the main tracks. All services upon the siding beyond that point, in placing the car for loading or unloading at a particular spot convenient to the shipper, are what may be called volunteered services in the sense that they are in addition to the main-line haul and in excess of any obligation of service by the carrier at common law. Nevertheless, the custom of making deliveries at the warehouse or factory door on private sidings is one of long standing in this country, and under certain language in the act it is possible that the carriers may be required, upon reasonable compensation, to do this spotting, as it is called. We find no authority, however, English or American, that holds or intimates that the line carrier, in connection with the main-line haul, is under any

obligation to spot a car at the factory door on a private siding except upon reasonable compensation included in the rate itself or set up in the form of a special charge.

There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and where a charge for the spotting service in addition to the line-haul rate might therefore be justified, but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt or delivery of carload freight. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge should be made for each additional placement of the car for that purpose.

The mere fact that many individual plants are operated together as a single industry does not deprive the industry of the right to such a service in the receipt and delivery of carload freight at each of the several plants as that plant would be entitled to have if it were operated separately, unless the collective operation so far removes the necessity for such a service as to make it unreasonable for the industry to demand the service.

To permit the carriers to add to the line-haul rate a charge for the movement of cars incident to the receipt and delivery of carload freight at industries selected because of their size or complexity, or upon some other basis equally uncertain, while treating a like service at all other industries as covered by the line-haul rate, would result in unjust discrimination of a flagrant character.

The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur it does not cover a like service when the movement is over the interior tracks of an industrial plant is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purposes of the industry. It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind.

Especially ought the tracks of the industrial plant to the extent that they are used by the carrier for a public service be treated as a part of its terminal facilities where the carrier does not show that it would be possible for it to provide the necessary terminal facilities in any other way.

The public interest is served in many ways by permitting the carriers to use the tracks of industrial plants as a part of their terminal facilities. The exclusively owned terminals of the carriers are thereby relieved of a heavy burden under which they would either break down completely or be so congested as to greatly inconvenience shippers who are compelled to receive and deliver their freight in those terminals. The distribution of terminals also tends to prevent the undue concentration of industries and consequent concentration of population, thus aiding the solution of one of our social problems.

The proposed spotting charge of the Chesapeake & Ohio Railway Company of Indiana, requires separate consideration. The industries to which it is proposed to apply this charge are located on the tracks of the Muncie & Western Railroad at Muncie, Ind. In *In re Muncie & Western R. R. Co.*, 30 I. C. C., 434, we held this road to be a mere plant facility of the principal industry located thereon, and not entitled to a division of joint rates with the trunk lines. That case is now pending on a petition for rehearing by which we are asked to reconsider that finding.

There are only two industries on the Muncie & Western, and these industries are served by two belt lines in addition to the Muncie & Western. The principal one of these two industries has a large plant, and the three lines referred to serve different parts of the plant. When the movement is over either of the two belt lines the Chesapeake & Ohio of Indiana absorbs the switching charge of that line and gives the shipper the Muncie rate, but it now proposes to add to that rate a minimum charge of $2 per car when the shipment moves over the Muncie & Western. If the Muncie & Western is a mere plant facility, the line-haul rate of the Chesapeake & Ohio of Indiana to and from Muncie covers the movement of cars incident to the receipt and delivery of freight on that track. If that road is a common carrier, the addition to the line-haul rate of a charge for the switching of cars over that road to and from industries located thereon would create an unjust discrimination so long as the trunk line absorbs the switching charges of other roads which serve the same industries, as it now does, the service in each case being substantially the same. The only reason which the Chesapeake & Ohio of Indiana gives for imposing the proposed charge for the switching of cars over the Muncie &

Western Railroad to and from the industries thereon, while it absorbs the switching charges of other roads which serve the same industries, is that such other roads are common carriers, while the Muncie & Western Railroad, as the Chesapeake & Ohio of Indiana claims, is only a plant facility. It is unnecessary, therefore, in this proceeding to determine whether the Muncie & Western is or is not a common carrier, as in either case the proposed spotting charge has not been justified.

With the growth of terminal areas and the consequent increase of terminal expenses, there may be a growing need for a separation of the charges for line-hauls from the charges for terminal services, and a graduation of charges for terminal services so that each industry within the terminal area will pay in proportion to the service it receives in addition to the line-haul, if such a system should in the future be deemed to be preferable to what now obtains; but before that could be done there would have to be a separation of the cost of the line-haul from the cost of the terminal service, and a complete reconstruction of rates.

We conclude, therefore, and find that the respondents have not justified the suspended tariffs, and an order will be entered requiring those tariffs to be canceled. The respondents may, however, file new tariffs providing for spotting charges in those instances in which the terminal services performed exceed the services which under established custom is, or should be, performed for the line-haul rate, in accordance with the views expressed in this report.

COMMISSIONER HARLAN dissents from the conclusions of the Commission in this proceeding and will later file a separate report.

EXHIBIT 4.

Views of the Public Service Commission of the Commonwealth of Pennsylvania on the subject of spotting, as set forth in opinion filed February 18, 1919 in the cases of National Tube Company et al. v. The Baltimore and Ohio Railroad Company et al., which follows:

THE PUBLIC SERVICE COMMISSION

OF THE

COMMONWEALTH OF PENNSYLVANIA.

Complaint Docket No. 193-3.

NATIONAL TUBE COMPANY

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

Complaint Docket No. 193-4.

CARNEGIE STEEL COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH & LAKE ERIE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA COMPANY, PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, ERIE RAILROAD COMPANY.

Complaint Docket No. 193-5.

AMERICAN STEEL & WIRE COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA COMPANY, PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

INTERVENORS ST. CLAIR TERMINAL RAILROAD, ETNA & MONTROSE RAILROAD, PITTSBURGH & OHIO VALLEY RAILROAD, MERCER VALLEY RAILROAD, MCKEESPORT CONNECTING RAILROAD, NORTHERN LIBERTIES RAILWAY COMPANY, DONORA SOUTHERN RAILROAD COMPANY.

REPORT OF THE COMMISSION.

AINEY, *Chairman*:

There are three complaints now before us, all relating to the withdrawal, by respondents, of rate allowances to industrial railways for deliveries to their proprietary industries, which, because of the similarity of conditions presented, were heard together and may be disposed of in this report.

The National Tube Company, complainant in No. 193-3, is engaged in the manufacture of wrought iron pipe, with four plants located in McKeesport, on the McKeesport Connecting Railroad, and two plants located in Pittsburgh, on the Monongahela Connecting Railroad. Its complaint is directed against the Baltimore and Ohio Railroad Company, the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company.

The Carnegie Steel Company, complainant in No. 193-4, is engaged in the manufacture of steel products, with plants located at Munhall, Homestead, Rankin, South Duquesne and Bessemer, on the Union Railroad; at Clarion, on the St. Clair Terminal Railroad; at Etna, on the Etna and Montrose Railroad; at Pittsburgh, for-

merly Allegheny, on the Allegheny Division of the Pittsburgh and Ohio Valley Railway; at Neville Island, on the Neville Island Division of the Pittsburgh and Ohio Railroad; at Pittsburgh, on its own Lucy Furnace tracks, connecting with the B. & A. V. Division of the Pennsylvania Railroad; at Farrell, on the Mercer Valley Railroad, and at Sharon, on the lines of the Pennsylvania Company, the Lake Shore and Michigan Southern Railroad Company and Erie Railroad Company. Its complaint is directed against the Pennsylvania Railroad Company, Pittsburgh and Lake Erie Railroad Company, Baltimore and Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, Lake Shore and Michigan Southern Railway Company, Erie Railroad Company.

The American Steel and Wire Company, complainant in No. 193-5, is engaged in the manufacture of steel products, and has two plants, one located at Pittsburgh, on the Northern Liberties Railway Company, and the other at Donora, on the Donora Southern Railroad Company. It complains against the Pennsylvania Railroad Company, Baltimore and Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

Each of these complaints charges that the respondents, designated herein trunk line railroads, by the cancellation of tariffs providing for allowances for certain terminal services which were performed by the Union Railroad Company, the St. Clair Terminal Railroad Company, the Etna and Montrose Railroad Company, the Pittsburgh and Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad, the Monongahela Connecting Railroad, the Northern Liberties Railway Company, the Donora Southern Railroad Company, herein designated the industrial railways, and for certain terminal and switch-

ing services performed by the Carnegie Steel Company, complainant, at its Lucy Furnaces in Pittsburgh, at the North Sharon Steel Works and furnaces in Sharon, have imposed the expense of these terminal services upon the complainants.

The complainants allege that the effect of these cancellations is to increase the rates to complainants for the same service. The complainants further allege that such increases are unjust and unreasonable and unduly discriminatory. Another ground of complaint is that the trunk line railroads have, without the filing of any tariff, issued orders that on and after a designated date demurrage will be charged for detention of cars from the time they are placed upon the interchange tracks of the industrial railways until they are returned to the respondent line carriers. It is alleged that this will result in an unjust and unlawful discrimination in favor of other shippers and receivers of like and other commodities in the Pittsburgh and Shenango District.

The answers of the respondents are in direct denial that the rates on commodities received at and shipped from complainants' plants have been unreasonably or unjustly advanced, or that the rates which will be in force, following the cancellation of the tariff, will be unjust and unreasonable or unduly discriminatory, or that thereby the complainants or their traffic will be subjected to any undue prejudice or disadvantage. The complaints were filed prior to the effective date, and, under the Public Service Company Law, the burden of proof rests upon respondents to justify the proposed increased rates.

Upon their petitions, the Commission permitted the St. Clair Terminal Railroad Company, the Etna and Montrose Railroad Company, the Pittsburgh and Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad Com-

pany, the Northern Liberties Railway Company and the Donora Southern Railroad Company to intervene. Strictly speaking, the issue presents a single and simple question for determination. Have respondents met the statutory burden of proof, justifying the increased rates caused by the cancellation of their tariffs, making certain allowances for services performed by the industrial railways in the placing and picking up of cars at or from the customary points for loading and unloading within the plant limits of the complaining industries?

The tariffs of the trunk line carriers prescribe rates covering the entire transportation service of haulage and delivery to the industries. In fixing these rates the services performed by the industrial railways were included. By withdrawing these allowances to the industrial railways, the complainants are required to bear an additional charge, and if the trunk lines make no corresponding reduction, an increase in rates results.

Inasmuch as no evidence was offered to show that these allowances were too much for the services performed by the industrial railways, or that the transportation rates out of which the allowances were paid were too low, the respondents have not met the burden of proof imposed upon them by our statute, and the cancellation of the allowance tariff cannot stand.

This was our conclusion in the Monongahela Connecting Railroad Company and the Union Railroad Company cases, under very similar circumstances: 1 Pa. P. S. C. Decisions 46; wherein we were constrained, in the light of the decision of the Supreme Court of Pennsylvania, Crane Railroad Company *vs.* Central Railroad Company of New Jersey, 248 Pa. 333, to differ with Interstate Commerce Commission's opinion expressed with respect to these two railroads in Industrial Railways Case, 29 I. C. C. 212.

We may now follow our former opinion with greater confidence, for since its deliveries, and the conclusion of testimony in these cases, the U. S. Supreme Court in the Tap Line Cases, 234 U. S. 1, has established the legal status of incorporated industrial railways and their right to receive from connecting trunk lines allowances out of rates for similar services rendered by them in making delivery of cars to their proprietary companies.

The Interstate Commerce Commission later said it could not distinguish in principle the decision in the Tap Line Cases from the Industrial Railway Cases, and therefore modified its former findings: Industrial Railway Cases, 32 I. C. C. 129.

The situation which confronted complainants, respondents and this Commission during the initial and developmental stages of the instant cases, both with respect to proper administrative policy and substantive law applicable to them, has materially changed.

No doubt the trunk line carriers were led to cancel their allowance tariffs because of the Interstate Commerce Commission's views expressed in Industrial Railway Cases, 29 I. C. C. 212, *supra,* but the later decisions of that Commission, as well as the deliverances of the State and U. S. Appellate Courts, have removed us from the pale of its reasoning and the scope of its authority.

Having determined that there is no evidence in this record with respect to the reasonableness of the increased rates, we are therefore bound under the law and the precedents, Monongahela Connecting Railroad Company, *supra,* and Baltimore Switching Case, 30 I. C. C. 581, to hold that the respondents have failed to justify the increases proposed.

This will dispose of the rate question at least until such time as evidence is presented, justifying a change; there are, however, several questions concerning the character of the services performed by these incorpo-

rated industrial railways and by the Carnegie Steel Company through its own unincorporated railroad which for the future guidance of parties concerned should be answered.

Among the propositions advanced by the respondents were:

First: That services, such as were performed by industrial railways and for which they were receiving allowances from the trunk line carriers, were plant services and not transportation services.

Second: Even if the services might be considered transportation services they ceased to be such when performed by the industrial railways for their proprietary industry.

The common law rule concerning delivery to complete the transportation service has from time to time undergone modifications predicated in part upon requirements of consignees and in part upon the means employed for common carriage. In the days of stage coaches and horse drawn vehicles engaged in public transportation personal delivery was required. It is obvious that railroads could not be held to make such deliveries, and delivery at freight stations and at designated public sidings were held to complete the transportation service. With the industrial development of the country private sidings were installed and the duty of common carriage broadened so as to require cars to be placed thereon, clearing the main tracks. Then warehouses, stores and factories were constructed adjacent to these private sidings, and "spotting" cars at customary points of loading or unloading became a part of the carriers' delivery obligation: Industrial Railway Cases, 29 I. C. C. 212 (226); Los Angeles Jobbers Case, 18 I. C. C. 310 (316); Buffalo Furnace Company, 21 I. C. C. 620 (627). As a means of accomplishing the terminal service in large industrial plants extended

mileage of tracks was required, frequently beyond the ability of the railroads to furnish. These tracks are usually located within the plant confines and so constructed as to enable the expeditious placing of cars at the different points therein where loading or unloading is to be done. In most instances these plant railroads were constructed and operated by the industries themselves, but later many of them, particularly in the Pittsburgh and Shenango districts now under consideration, were incorporated under the general railroad law of the Commonwealth. In practice they receive the cars from the trunk lines at the interchange tracks, classify them in their own yards, according to the materials with which they are loaded, and place them at the customary points of loading or unloading within the plants.

For this service and similar services, these industrial railways, for many years, received from the trunk lines, out of the latter's rates, the allowances prescribed in the trunk line carriers' tariffs. The complainants and the intervenors maintain this to be a transportation service, completing the delivery following the line haul, while the trunk lines insist that the delivery is complete when cars are placed by them on the interchange tracks of the industrial railway, and that the service performed by the latter companies for these proprietary companies is a plant service for which no allowance can be made without subjecting them to the charge of unlawful rebating or discriminatory practices.

The trunk line carriers cancelled their allowance tariffs to industrial railways following the opinion in Industrial Railway Cases, 29 I. C. C. 212, but, as heretofore noted, that opinion has been greatly modified by the distinguished body which announced it, and there have been new lines of demarcation established by the Court, so that what were formerly considered adminis-

trative questions have now been transferred to the body of settled and substantive law.

The development of the expressions of the law since these complaints were filed is evidenced by the following excerpts from decisions:

> "All the service by the line carriers beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within or without the plant, is a shipper's service and not a service of transportation which the line carrier may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad, and that the facilities used by the industry in performing the service, whether separately incorporated or not, are plant facilities and plant equipment. We also conclude and find that the delivery of a car by a line carrier upon the exchange track is a delivery to the industry, and that the elimination of demurrage, under the present practices, as a transportation charge against the industry is unlawful and gives the industry so favored an undue and unreasonable preference and advantage. We further find and conclude that undue and unlawful preferences and discriminations arise out of the present practice of the line carriers in performing such services without additional charge and in making allowances therefor out of the rate when performed by the industry or by its plant railway."
>
> Industrial Railways Cases, 29 I. C. C. 212 (237).

Following the Tap Line Cases, *supra*, this opinion was modified:

> "We think that in the light of the decision of the Supreme Court in the 'Tap Line Cases' it is our duty to so modify our findings in the original report herein as to permit the trunk line roads, if they so elect, to arrange by agreement with any of the industrial roads mentioned in our former report which are common carriers under the test applied by the Supreme Court in the 'Tap Line Cases,' and which

perform a service of transportation, for a reasonable compensation for such service in the form of switching charges or divisions of joint through rates."

Industrial Railways Cases, 32 I. C. C. 129 (132).

In the Birmingham Southern Railroad Case, 32 I. C. C. 110, it was held that the service between the trunk line interchange and the interior of the plant is a service of transportation and a part of the through haul.

In the Atchison, Topeka and Santa Fe Railway Company *vs.* Kansas City Stock Yards Case, 33 I. C. C. 92 (98), another feature of the situation was recognized by the Interstate Commerce Commission where it was held:

"Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured. The only restriction is that contained in Section 15 of the act to the effect that allowances to shippers for furnishing transportation or instrumentalities thereof shall be supervised by the Commission."

In the Chicago Switching Case, 34 I. C. C. 234 (239), the carriers used a system of tunnels carrying narrow gauge tracks under the streets of Chicago to make delivery to the underground shipping rooms of consignees. This service was included in the through rates, and upon the attempt of the carriers to cancel this supplemental service the Interstate Commerce Commission said:

"No good reason appears for placing the industries and shippers who are served by and dependent upon the tunnel and lighterage companies at a disadvantage as compared with other shippers

and consignees in the Chicago district, which by co-operative action of the carriers and for commercial, industrial and competitive reasons has become, and been maintained, as a common rate district or community."

"The justification for cancellation of through rates with the tunnel and lighterage companies consists mainly in the declaration that the line haul carriers are within their rights in taking such action because the service rendered by the tunnel and lighterage companies is a service beyond the rails of the line haul carriers which they have a legal right to insist upon an additional charge. They show the amounts paid to the tunnel and lighterage companies out of the through rates, but they fail to present any evidence to show that the increased charges to those who use or are dependent upon the tunnel or lighterage company would be reasonable, and practically ignore the question of unjust discrimination against shippers and consignees which would thereby be created."

The Mitchell Coal Company Case, 230 U. S. 247 (263) recognized the predominating characteristics of the switching district as including the common delivery and shipping points, and held that the rate running to that district includes a delivery to any point of that district which is accessible by rail. Justice Lamar, who wrote the opinion, said:

"But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally ap-

plied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district."

"Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor."

In the Second Industrial Railway Case, 34 I. C. C. 596, it was recognized that the industrial railway adjacent to a plant is a legitimate factor of transportation in and out of the plant.

The Car Spotting Case, 34 I. C. C. 609, goes much further and holds in effect that the contract of transportation begins where the car is loaded and ends where the car is destined to be unloaded, no matter where these points may be, whether in or out of the plant. The size of the plant, the complexity of the industrial tracks is no objection or hindrance to the operation of the principle; placing the burden on the carrier in extraordinary cases of establishing a satisfactory reason for non-compliance.

The complainants' testimony that the service tendered by the terminal lines is identical with that rendered by the trunk lines to other industries in the same territory without any charge, in addition to the line haul rate, was not controverted, and it was further established that complainants' plants are located in a territory from and to which rates are made up by the group or zone system. The Pittsburgh rate group extends over a territory of approximately 6,058 square miles and the propriety of this grouping was not questioned, and is apparently justified under Article III, Sec. 9 (*a*) of the Public Service Company Law: Valley Smokeless Coal Company *vs.* Pennsylvania Railroad Company, 4 P. C. R. 611.

The American rule of rate making includes in the freight rate two terminal services, one initial and one final, in addition to the road haul, and based upon the application of this rule, shorter hauls pay a larger rate proportionately to mileage than do the longer hauls. Thus terminal expenses are equitably apportioned. The rule is sufficiently stated in the Car Spotting Charges, 34 I. C. C. 609 (616):

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line haul rate, and in the Los Angeles Case, 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. Los Angeles Case, 234 U. S. 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an

industry spur, or a private siding, nothing should be added to the charge for the line haul."

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant to now add a charge to the line-haul rate for that service would be revolutionary." * * *

(619) "The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur it does not cover a like service when the movement is over the interior tracks of an industrial plant is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purpose of the industry. It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind."

The fundamental principle of American rate making is that the freight rate should cover the entire carriage of taking the goods up, transporting them to their destination and setting them down: Union Trust Company *vs.* Atchison, T. and S. F. R. R. Company, 64 Fed. Rep. 992 (994):

"The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the com-

pensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be."

See also Covington Stock Yard Case, 226 U. S. 286. In the Minnesota Rate Case, 230 U. S. 352 (84), Justice Hughes said:

"Every rate comprehends two terminal charges, the initial and the final, and a haulage charge. It is declared to be a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; for even if the haulage charge in the former case were the same per mile, the rate per ton mile should be less for the longer haul, as the terminal charges would be spread over a greater distance."

And the presumption is that the imposed rate for carriage includes adequate compensation for terminal services: Interstate Commerce Commission *vs.* C., B. & Q., 186 U. S. 320 (326).

The English decisions afford very little assistance, for there, under the English Railway and Canal Traffic act, the road haul and the terminal services are subject

to separately imposed rates: Los Angeles Jobbers Case, 18 I. C. C. 310.

From these cases it would appear that in the absence of evidence of unusual circumstances making them exceptions to the rule, the complainants are entitled, as a part of the carrier's duty of common carriage, to have their carload shipments delivered at the customary points for loading or unloading in their plants and without any expense to them other than as included in the line haul rates, a delivery similar to that on private sidings of other industries in the same territory.

This duty of delivery resting upon the carrier, he is not bound to perform the service with his own power "and there is nothing to prevent his hiring the instrumentality instead of owning it." Sugar Lighterage Case, 231 U. S. 274 (58 Law Ed. 218); Kansas City Stock Yard Case, 33 I. C. C. 92.

> "Manifestly it is unfair that some shippers should perform the service of spotting cars at their own expense while many of their competitors in the same industrial district have this service performed by and at the expense of the carriers. The line-haul service of course varies as to shipments transported by different lines for the same shipper and by the same line for different shippers, although all may pay the same rate; but for this service it is impracticable to grade rates with such nicety as to make them absolutely dependent upon every slight variation in the measure of service rendered. The service of handling traffic from the line-haul carriers' interchange tracks to the points of placement on the private industry tracks within the shippers' plants, at times and in the quantities to suit the convenience of shippers is, however, distinctly different in character from the line-haul service. Obviously it is discriminatory for the carriers to place ore shipments for some shippers on private tracks within their plants at the points of unloading while other shippers are served only at the gates of their plants,

or at the point of interchange with the industry tracks." Iron Ore Rate Case, 41 I. C. C. 181 (200).

There is little doubt that the operation of these industrial railways promotes efficiency and economy. Power under one control is admittedly desirable, and particularly where there is more than one trunk line connection, and permits the placement of cars for loading and unloading at the times when that work can be most expeditiously and advantageously accomplished. In some instances the inter-mill work is performed by the industrial railway, and some of the more modern plants have been designed with a view to having these services performed by the power of the industry (or industrial railway) and not by the power of the railroad company.

That the terminal service can be performed by the terminal lines at much less cost than if rendered by the trunk lines themselves is established. The service in placing cars for the iron and steel industry is not so arduous or complicated as in other industries, as large sums have been invested by them in providing adequate terminal facilities, an expense of which the trunk lines have been relieved, and a service for the performance of which they are not equipped: Car Spotting Case, 34 I. C. C. 609 (615).

For perhaps twenty years in the Pittsburgh and Shenango District, these or similar allowances have been treated as covered by the line haul rate and an additional charge to the complainants for the service covered by these allowances is not proper: Car Spotting Case, 34 I. C. C. 609 (616).

Section 1 (*e*), Article III, of the Public Service Company Act, provides:

"Whenever any owner of property transported by any common carrier, or any user or patron of any other public service company, renders, directly or indirectly, any service connected with such transportation or other public service, the charge and

allowance therefore shall be no more than is just and reasonable; and the Commission may, after hearing, on its own motion or upon complaint, determine what is a reasonable charge, as a maximum, to be paid by the carrier or other public service company for the use of the service so furnished or rendered, and what is a proper proportion of the said cost, and fix the same by appropriate order, to be observed and enforced by the parties concerned."

Predicated upon this section which is substantially similar to a provision in the Interstate Commerce Act, the complainants maintain that the rights of the owner to demand and receive reasonable compensation for services rendered in connection with the transportation is established.

Justice Holmes in the Grain Elevator Cases, 222 U. S. 42 (46), in affirming the judgment of the Circuit Court, 176 Fed. Rep. 409 (which see) held:

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in Section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or, now, upon its own motion: Act of June 18, 1910, c. 309, 12, 36 Stat. at L. 539, 553). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit

to Peavey & Co. for the work. See I. C. C. *vs.* Stickney, 215 U. S. 98."

And a carrier has a right under the act to regulate commerce to pay shippers a reasonable allowance for services in connection with the transportation of goods shipped by them. Mitchell Coal Case, 230 U. S. 247. To the same effect is Sugar Lighterage Case.

> "Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street Station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed." Sugar Lighterage Case, 231 U. S. 274 (292).

The record in this proceeding shows that the expense of the terminal transportation service such as performed by the intervenors' railroads, to-wit, the classification of the cars with respect to destinations of consignees and the switching of cars to and from points of loading and unloading on the spur tracks of the industries, is included in the through rates to and from the Pittsburgh and Mahoning and Shenango Valley districts, and is a part of the transportation which the respondent railroads are under obligations to perform, and that such terminal transportation service is done by intervenors' railroads, at the instance and procurement of the carriers; and in such circumstances, under the authorities cited, the owner of the freight thus transported is entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed, where the services and facilities are performed by an unincorporated railroad, such as the Lucy Furnace Railroad of the Carnegie Steel Company. Such allow-

ances are not purely permissive as counsel for defendants contends, but mandatory where the owner of the property furnishes facilities, in connection with transportation.

The argument that a service by an industrial railway which is a transportation service when performed for a non-proprietary industry becomes a plant service when performed for its proprietary company, is not convincing, and in any event falls in the light of the decision in Tap Line Case; 234 U. S. 1 (28) where it was held:

> "As we have said, the Commission by its order herein required the trunk lines to re-establish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves." See also Los Angeles Switching Case, 234 U. S. 294.

The decision of the Interstate Commerce Commission in the Lorain case (National Tube Company *vs.* Baltimore and Ohio Railroad Company, 50 I. C. C. 485) affords us very little assistance. The majority opinion therein is a restatement of the minority views expressed

in several of its deliverances since Industrial Railways Case, 29 I. C. C. 212, was decided. It is a retrogression to the position taken in that case and which the Commission abandoned, following the decision in the Tap Line Case, *supra*. The minority opinion in the Lorain case prepared by Commissioner Hall points out: "The majority report declares unlawful what we have heretofore found lawful", and "undoes what we have done". "It is", said he "in essence a return to the doctrine originally announced in the Industrial Railways case * * * and which we abandoned in view of the Supreme Court's opinion."

He further stated that which we believe to be fundamental in considering cases of this kind: "Our function is to regulate and not to prohibit divisions between trunk lines and industrial roads." Whenever the circumstances disclose, as in this instant case they do not, that the rates are unjustly discriminatory or unduly or unreasonably preferential, it is within the power and it is the duty of the Commission by appropriate order to correct the evil. On the whole, we are constrained to accept the view and reasoning of the minority, believing that the majority opinion is out of harmony with the trend of the decisions of the courts, and that if followed it would again throw the whole industrial railway administrative policy into a chaos of incertitude from which it was therefore rapidly and happily emerging.

Based upon the foregoing authorities, we conclude:

First: The services performed by industrial railways in placement of cars at customary points for loading or unloading within the plant industry, when performed in connection with an intrastate road haul over respondents' lines, is a terminal transportation service for which the industrial railways are entitled to reasonable allowance out of the through line haul rates.

Second: These services when performed by industrial railways for their proprietary industries do not therefore cease to be transportation services.

Third: The complainants are entitled to placement of cars as part of the transportation service, the railroads must under the disclosed circumstances employ the incorporated railroads and make allowances to them out of the line haul rate. They *may* employ the railroads' facilities of the plant industries where the railroads are not incorporated, in which event the trunk line must make similar allowances.

Jurisdiction for the purpose of determining whether and what reparation should be awarded will be retained and hereafter heard upon separate petitions.

(Signed) WM. D. B. AINEY,
Chairman.